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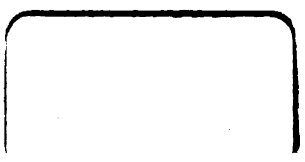

FREDERICK ALLIS

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MODERN REPORTS;

OR,

SELECT CASES

ADJUDGED IN

THE COURTS

OF

KING'S BENCH,

CHANCERY, COMMON PLEAS,

AND

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VOLUME THE EIGHTH.

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CONTAINING,

Cases in the King's Bench, from the Eighth to the Twelfth Year of King George the First,

THE FIFTH EDITION,

CORRECTED:

WITH THE ADDITION OF MARGINAL REFERENCES AND NOTES,

By THOMAS LEACH, Esq.

OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

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THE

PREFACE.

LAW and EQUITY, the ſubjects of the enſuing Caſes, muſt be allowed to be the ſupreme excellencies in all civil governments; and as no nation can poſſibly exiſt without thoſe rules and ſanctions, ſo their eſtabliſhment and advancement will be acknowledged to be the chief honour and glory of THE PRINCE, as well as the higheſt ſecurity and happineſs of THE PEOPLE.

THE FIRST PART contains Caſes argued and adjudged in the Court of King's Bench, from the beginning of *Michaelmas Term* 1721 to the end of *Trinity Term* 1726, wherein are illuſtrated and explained, not only many of the moſt modern (which are always the beſt eſtabliſhed) rules of practice and methods of proceeding in that court, but many uſeful and curious points, relating to the rights and prerogatives of the Crown, as well as to the private and particular rights of the ſubject; in the arguing and debating whereof, not only divers former abſtruſe opinions are cleared up and ſettled, but likewiſe many antient and modern ſtatutes illuſtrated and explained.

THE PREFACE.

THE LATTER PART (*a*) of this Collection conſiſts of ſome ſelected Caſes argued and decreed in the High Court of Chancery, between *Eaſter Term*, in the eighth year, and *Trinity Term*, in the eleventh year, of *George the Firſt*, incluſive; wherein not only divers of the points and ſtatutes before-mentioned are expounded and determined by an equitable conſtruction, but alſo ſeveral inſtances of relief given in caſes not relievable at law.

It alſo contains the three following Caſes on Appeals:

FIRST, The caſe of *Trevor v. Trevor*, relating to marriage-articles and divers other ſettlements, made by Sir JOHN TREVOR, late *Maſter of the Rolls*, decreed and appealed in 1719.

SECONDLY, The caſe of *Roper v. Radcliff*, on the ſtatute 11. & 12. *Will.* 3. c. 4. for diſabling papiſts to purchaſe lands, decreed and appealed about the year 1713, with two learned and elaborate arguments on the hearing of that cauſe.

THIRDLY, The caſe of the *Lord Derwentwater*, upon an appeal from the commiſſioners of forfeited eſtates, heard before the Judges thereto delegated, the ſixteenth day of *February* 1718, in the fifth year of *George the Firſt*.

(*a*) The latter part here alluded to now forms the ninth volume of theſe Reports.

PREFACE

TO THE

SECOND EDITION.

THE Editor having been favoured with a ſight of many marginal Notes, and Corrections made ſoon after this Book was publiſhed, by a Gentleman then at the Bar, for his own private uſe, and founded upon contemporary notes of the caſes therein contained, and judging from ſuch marginal notes and corrections "that the book "muſt have been exceedingly imperfect and erroneous," has done his beſt endeavours to ſupply the defects of the former wretched edition.

He has, beſides, added many references to Books of Reports publiſhed ſince, which comprehend a period of near forty years.

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SECONDLY, As to *the verdict*, it was objected, that the jury found that the cattle for which the ſaid tithes were demanded were not fed with hay and ſtubbles for which tithes had been already paid, but they did not find that there were any proceedings in the ſpiritual court after a prohibition delivered.

A verdict on a declaration in prohibition, finding all the material parts of the iſſue, is good, although the jury do not find any thing reſpecting the proceedings after the prohibition; for the allegation of the *contempt* is merely matter of form.

IT WAS INSISTED *for the plaintiff* in this action, that if all the iſſues are not found, this judgment cannot be ſupported; and it is part of this iſſue, that the defendant had proceeded in the ſpiritual court after a prohibition delivered; and if this had been found, then the plaintiff would have been entitled to damages. It is true, if an iſſue be joined on part of a thing in ſuit, and that part is found by the jury, ſuch a finding will ſupport the judgment; but when ſeveral iſſues are joined, as in this caſe they are, and ſome are found, and ſome not found, the verdict is inſufficient (*a*). (*Quod Cur. conceſſit.*) It is certain, that the plaintiff would have been entitled to damages if this matter had been found; for the caſe of *Anger v. Bower* (*b*) is an authority in point, where it was found, and the plaintiff had judgment for his damages. It is true, that judgment was reverſed, but it was becauſe the plaintiff had not laid a *venue* where the proceedings were, &c. after the prohibition delivered.

S. C. 1. Stra. 482. Fort. 350. Cro. Eliz. 854. 2. Lev. 111. Stra. 843. Ld. Ray. 1518. 1. Wilſ. 44. 5. Com. Dig. "Pleader" (S. 19.).

TO WHICH *it was anſwered*, that this objection is only to matter of form, which is cured by the verdict (*c*); for the not finding * any proceedings by the defendant after a prohibition delivered, and *contra prohibitionem*, is merely formal, and like the not finding the breaking and entry *vi et armis* in an action of treſpaſs (*d*).

* [3]

THE COURT. It is true, that where ſeveral iſſues are joined, a verdict which finds one, and not the other, is not good; but in this caſe the not finding any proceedings in the ſpiritual court *contra formam prohibitionis* is but matter of form. However, this verdict has found all the material parts in iſſue; and therefore it is ſufficient to ſupport this judgment. The alledging in the declaration, that the plaintiff in the ſpiritual court proceeded there *contra formam prohibitionis* is but a ſuppoſed contempt, and ſuggeſted by the plaintiff in the action as a ground for a *prohibition*, and the not finding this contempt is altogether immaterial; it is the ſame with not finding *vi et armis* in an action of treſpaſs. It is true, that there are precedents both ways; but in ſuch caſes the Judges always follow that which is leaſt prejudicial. As to the caſe of *Anger v. Bower*, there was actually a proceeding after a prohibition granted; and this was found by the jury, and damages aſſeſſed; but the *venue* being laid in a wrong county, the jury could not ſubject the defendant to pay the damages; and therefore that judgment was ſet aſide; ſo it is out of this caſe. Beſides, if the plain-

(*a*) 3. Lev. 39. 55. W. Jones, 447. 1. Roll. Abr. 515. 575. Plowd. 471. T. Jones, 128.

(*b*) 1. Vent. 348. 350.

(*c*) 1. Saund. 81. 140. Show. Caſ. Parl. 201. Biſhop *v.* Needler, Plowd. 468.

(*d*) Raſt. Ent. 490. Townſend's Tables, 172. Leon. 240.

STRATFORD *againſt* NEALE.

tiff would have any advantage by the defendant's proceeding after a prohibition, this being matter of evidence; he ſhould have proved it at the trial, and inſiſted on his damages; which he has not done.

THE JUDGMENT, therefore, was affirmed by the whole Court.

*[4]

Caſe 2.

The King *againſt* Clegg.

Tueſday, 7 November 1721.

The ſeſſions may make an *original order* of baſtardy, but the party ought to be *ſummoned*; and therefore the Court will intend a ſummons, though not ſtated in the order.

S. C. 1 Stra. 475.

THE DEFENDANT *Clegg* was, by an order of ſeſſions made by two juſtices of the peace (*a*), adjudged to be the *putative father* * of three *baſtard children*; and it was ordered, that he ſhould pay ten pounds to the overſeers of the poor of the pariſh of, &c. "for charges which the ſaid pariſh had already ſuſtained by reaſon of thoſe baſtard children," and two ſhillings and ſixpence every week "for ſo long time as the ſaid children, or any or "either of them, ſhould be chargeable to the ſaid pariſh."

IT WAS INSISTED on *Clegg*'s behalf, that the order was irregular.

FIRST, Becauſe it did not ſet forth that *Clegg* was *duly ſummoned* to appear before them. It is true, it ſet forth that he had *notice to appear*, but did not ſhew for what cauſe; and therefore it is no regular ſummons. Nor does it appear that he was ever *heard*. This order being made at the ſeſſions is very different from an order made by two juſtices, becauſe from that the party has a right of appeal (*b*).

PRATT, *Chief Juſtice*. No notice ſeems neceſſary. In the caſe of *The King v. Simpſon* (*c*), upon a conviction for deer-ſtealing, after long deliberation, we adjudged that he might be convicted without his general appearance (*d*).

EYRE, *Juſtice*. The reaſon why it is not neceſſary to ſhew *a notice* in an order of two juſtices is, becauſe the party has an appeal to the ſeſſions, where he may be heard. It was never fully determined until *Eaſter Term*, in the eleventh year of *Queen Anne*, that the ſeſſions has original juriſdiction of baſtards. The ſtatute of 3. *Car.* 1. c. 4. which has given the ſeſſions juriſdiction, has given them the ſame power as the two next juſtices have by the 18. *Eliz.* c. 3.; and if ſo, why cannot an appeal lie to the next ſeſſions from this order as well as if it had been made by two juſtices? Beſides, this being an order made by the ſeſſions in a matter

(*a*) It was an order made originally at the ſeſſions.

(*b*) See the caſe of Reg. *v.* Cripps, Eaſter Term 11. *Anne*, Sett. & Rem. page 38. pl. 63.; Rex *v.* Auſtin, poſt. 309, 310.; Rex *v.* Venables, poſt. 377, 378.

(*c*) Hilary Term 3. *Geo.* 1. Strange, 46.

(*d*) Stra. 44. 10. Mod. 248. 341. 378. Gilb. Caſes, 282.—See alſo Foſcawen on Convictions, 52 to 57.

of

of which they have juriſdiction, we ought to intend their proceedings regular, when the contrary does not appear.

THE KING *againſt* CLEGG.

FORTESCUE, *Juſtice*. As to the want of notice, natural juſtice requires that every man ſhall be heard before he is condemned in judgment, unleſs through his own default. But though every perſon accuſed ought to be ſummoned, yet the queſtion will be, whether ſuch ſummons muſt of neceſſity appear upon the record. A ſummons is always ſet forth in caſe of a *mandamus*; and in a conviction for deer-ſtealing, as in this caſe, it ſhall be intended that the defendant was ſummoned, ſince the contrary does not appear (*a*). This exception was made in the caſe of an order for removing an apprentice; but it was over-ruled on the ſuppoſition of regularity.

Cro. Car. 470. pl. 2.

PRATT, *Chief Juſtice*. I do not underſtand the diſtinction which has been taken when we are to preſume the proceedings by juſtices regular, and when not; for we are to examine all their proceedings upon a ſuppoſition of irregularity. The caſe of *The Queen v. Lunn* (*b*) I heard LORD PARKER, when *Chief Juſtice*, deny for law; and I ſhall never give any opinion to confirm ſuch an order; for whether the wages were due for huſbandry or not, was the point of their juriſdiction; and ſurely we can never intend them to have juriſdiction of what they do not ſhew to be within their juriſdiction. As to the argument that no notice is neceſſary, becauſe an appeal lies to the next ſeſſions, I do not ſee how an appeal can lie from one ſeſſions to another, ſince it is the ſame court, though compoſed of different perſons. It is admitted, that the juſtices of peace have an *original juriſdiction* in caſes of *baſtardy*, and that their orders, if regular, ſhall be concluſive (*c*); but if irregular, as this is, they ſhall be quaſhed.

SECONDLY, It was objected, that the two juſtices have no power to charge him with a ſum in groſs; and the caſe of *The Queen v. Stevenſon* (*d*), in *Michaelmas Term*, in the tenth year of *Queen Anne*, was cited.

The putative father of a baſtard child may, by 18. *Eliz.* c. 3. be charged with a ſum in groſs.

THE COURT. A *putative father* may be charged with a ſum in groſs, though this is ſeemingly againſt the ſtatute 18. *Eliz.* c. 3. by which the power given to the two juſtices is to charge the mother, or reputed father, with the payment of money weekly, but they have likewiſe power to take order for the relief of the pariſh, which muſt be intended againſt the charge which it may ſuſtain, as well as againſt the charge already ſuſtained (*e*).

(*a*) Reg. v. Lunn, Trinity Term 3. *Anne*, 6. Mod. 204.

(*b*) 6. Mod. 204.

(*c*) See Rex v. Greaves, Dougl. 633. where it is ſettled, that the ſeſſions have, in this caſe, an original juriſdiction.—See alſo Slater's Caſe, Cro. Car. 471.; Wood's Caſe, 2. Bulſt. 355.; and Mr. Conſt's edition of Bott's Poor Laws, 1 vol. page 442.

(*d*)

(*e*) See Rex v. Eve, 2. Show. 256.; Rex v. Skin, 1. Bott P. L. 421.; Rex v. Odam, 1. Salk. 124.; Rex v. Willey, 1. Bott P. L. 436.; Rex v. Graveſend, 1. Bott, 437.; Rex v. Holland, B. R. H. 169.; Rex v. Taylor, 3. Burr. 1679.

Quære, If one order can charge a man with being the father of *three* baſtard children.

THIRDLY, It was objected, that *Clegg* was charged to be the father of three baſtard children by one order, when there ſhould be as many orders to charge him as there were baſtards.

But THE COURT, as to this matter, gave no judgment.

The juſtices cannot order a putative father to give *ſecurity* to perform the order.

FOURTHLY, It was objected, that the defendant is ordered to give *ſecurity* for the performance of the order, which is illegal.

PER CURIAM. The juſtices cannot order *ſecurity*, unleſs in the caſe of a contempt (*a*). Let that part of the order be diſcharged.

And it was adjourned as to the reſt, in order that the pariſh ſhould have time to ſhew whether *Clegg* was regularly ſummoned to appear before the two juſtices who made this order (*b*).

(*a*) Reg. *v.* Chaffey, 2. Ld. Ray. 858. 3. Salk. 66. ; Rex *v.* Meſſenger, 1. Bott P. L. 418. pl. 550. ; Rex *v.* Fox, 1. Bott P. L. 422. pl. 555. 1. Bac. Abr. "Baſtardy" (D.).

(*b*) In Trinity Term 12. *Geo.* 1. this caſe was moved again, and the order was confirmed without oppoſition, S.C. 1. Stra. 475.—See alſo Rex *v.* Auſtin, poſt. 309, 310. and the caſe of Rex *v.* Venables, that it is not neceſſary to ſet forth in the order that the party was ſummoned, although the juſtices are puniſhable for making an order without ſummoning the party, Poſt. 378. 1. Stra. 630. 2. Ld. Ray. 1405. Rex *v.* Hawkins, 1. Bott P. L. 427. ; Rex *v.* Cotton, 1. Seſſ. Caſ. 179. ; Rex *v.* Neal, 1. Bott P. L. 429. But in the caſe of *convictions* by juſtices of the peace, it ſeems, that the party muſt not only be ſummoned, but that the ſummons muſt, in point of fact, be ſhewn upon the conviction, Reg. *v.* Dyer, 1. Salk. 181. ; Rex *v.* Simpſon, 2. Stra. 46. ; Rex *v.* Mallinſon, 2. Burr. 679.

* [5]

Caſe 3.

* The King *againſt* Walter.

A defendant in cuſtody muſt be tried within two Terms after the commitment.

THE DEFENDANT was committed by a warrant under the hand and ſeal of a juſtice of the peace for being "a notorious *owler* "and *ſmuggler*."

Being in cuſtody, he brought a *habeas corpus*, and moved by his counſel to be diſcharged.

FIRST, Becauſe he had been in gaol two Terms ſince the indictment was found, and was not yet brought to his trial.

THE COURT allowed this firſt objection, *viz.* that the defendant ought to be tried within two Terms after his commitment, according to the *habeas corpus* act (*a*).

(*a*) By 31. *Car.* 2. c. 2. ſ. 7. "If a perſon ſhall be committed for high treaſon "or felony, plainly and ſpecially expreſſed "in the warrant of commitment; and upon "his petition in open court the firſt week "of the Term, or firſt day of the ſeſſions, "to be brought to his trial, ſhall not be "indicted ſome time in next Term or "ſeſſions after ſuch commitment, the "Court, on motion in open court the laſt "day of the Term or ſeſſions, ſhall let the "priſoner to bail, unleſs it appear on oath "that the witneſſes for the king could "not be produced the ſame Term or "ſeſſions: and if any perſon ſo committed, upon his prayer in open court as "aforeſaid, ſhall not be indicted and tried "the ſecond Term or ſeſſions after his "commitment, he ſhall be diſcharged "from his impriſonment."

SECONDLY,

SECONDLY, It was objected, that the charge in the warrant of commitment is very loose, *viz.* for that the defendant was "a "notorious owler and smuggler," which is not a sufficient charge to deprive a subject of his liberty, especially in a criminal cause, where the utmost certainty is required (*a*).

The commitment of a person as "*a notorious* "*owler*" is good.

THIRDLY, It does not appear that the defendant was charged on oath (*b*).

A warrant of commitment is good, although it do not appear that the charge was *on oath*, or *when* the fact was committed.

FOURTHLY, No time is alledged when the fact was committed (*c*).

But THE COURT, as to these other objections, held, that a justice of peace must take care that he has such an information of the fact as may be sufficient to support his warrant of commitment; but that he need not set it forth in the warrant itself, because so much certainty is not required in warrants as in writs and pleadings, which are always on record.

THE COURT was of opinion to bail him; but he, having no bail was remanded.

(*a*) See 2. Hawk. P. C. ch. 16. f. 16. 2. Hale P. C. 132. Rex *v.* Evered, Cald. Cases, 26. and Rex *v.* Judd, 2. Term Rep. 255.

(*b*) 2. Hawk. P. C. ch. 16. f. 17. 2. Inst. 596. 4. Com. Dig. "Imprisonment" (H. 7.)

(*c*)

The King *against* Archbishop of Armagh and Jackson.

Case 4.

Wednesday, 15 *November* 1721.

* [6]

A WRIT OF ERROR on a judgment in the king's bench in *Ireland*. The case was thus:

If the king be seised of a *vicarage*, and the archbishop of a *rectory* situate in the same parish, in *Ireland*, and the incumbent of the vicarage dies, the archbishop cannot, during the vacancy, unite the two churches by virtue of the statute 17. *Car.* 2. c. 3.; but if the vicarage had been full, the union might have been made, for the statute binds the king, although he is not expressly named.—S. C. 1. Stra. 516. 2. Roll. Abr. 778. Cro Eliz. 500. Barnard. K. 34. 42. 170. 285. 2. Stra. 837. Fortesc. Rep. 213. Fitzgib. 36. 1. Com. Dig. "Advowson" (F.).

THE KING was seised of the advowson of the vicarage of *Louthe*, in the diocese of *Armagh*; and *the Archbishop of Armagh* was seised of the advowson of the rectory of, &c. near the said vicarage, and being so seised, the king's incumbent died; and, after the said vacancy, *the archbishop*, by an instrument under his archiepiscopal seal, united both the said livings, according to the power which he had by the statute 17. *Car.* 2. c. 3. The statute enacts, "That in "every city or town corporate, and their liberties, where there are "two or more churches or chapels, and parishes thereunto belonging, the bishop of the diocese, with the * consent of the chief "officer or officers there, or the major part of them, and of the "patrons of such churches, may unite them, &c. and the "parishioners shall pay all tithes and other duties to the incumbent "of the church to which the other is united; but that notwithstanding such union, the parishes shall continue distinct as to all "rates, taxes, and parochial rights, and churchwardens shall be "appointed for each parish as before the union. And where one "or both of the said churches are full at the time of the union, it

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" ſhall take effect at the next avoidance after; and the patrons ſhall " preſent by turns to that which remains, &c. and that he whoſe " incumbent dies firſt ſhall firſt preſent, and afterwards by turns " ſucceſſively for ever." The king's incumbent being dead, and the vicarage being afterwards united to the rectory as aforeſaid, THE KING preſented another vicar, and *the archbiſhop* refuſing to admit him, a *quare impedit* was brought againſt *the archbiſhop*, and judgment given againſt him in the king's bench in *Ireland*.

Upon which the archbiſhop brought a writ of error in this court.

THE GREAT QUESTION was, Whether, ſince the one advowſon belongs to THE CROWN, there can be any union by virtue of the act, *i. e.* whether THE KING is bound by the general words of the ſtatute.

THE SECOND POINT was, Whether any union could be made when one of the churches was vacant.

THE COUNSEL *for the Archbiſhop* argued, that by the general words of this ſtatute this was a good conſolidation, although it was made after the avoidance of the vicarage by the death of the king's incumbent. The king's ordinary right ſhall be bound by ſuch general words in an act of parliament, which in this caſe was his right of preſentation; though a right, which he has by any prerogative, ſhall not be bound by ſuch words (*a*). Every ſtatute which is made for the advancement of juſtice, for the eſtabliſhment of religion, to ſuppreſs wrongs, to perform the will of the donor, to maintain the poor, or for the encouragement of learning, ſhall bind the ordinary right of the king by general words as well as the right of the ſubject (*b*); and this ſtatute has two of theſe purpoſes, *viz.* the eſtabliſhment of religion, and the encouragement of learning. This is proved by every ſaving of the king's right in an act of parliament, for it ſhews that his right would be bound, if it was not ſaved.

ON THE OTHER SIDE *it was argued*, to ſupport this judgment, that by the ſtatute before-mentioned a new power is created, and conſequently it muſt be literally performed, which, in this caſe, was not done; nay, it is impoſſible to be done, becauſe it is enacted, " that after the union, the patron whoſe * incumbent " firſt dies ſhall have the firſt preſentation;" which ſhews, that the Legiſlature intended that both the churches ſhould be full at the time of the union (*c*), for otherwiſe the right of ſurvivorſhip could never take place. Now here one was void when it was united to the other, and after it was conſolidated to the other there was but one incumbent, and if but one incumbent, then it is impoſſible that thoſe words in the ſtatute can ever be ſatisfied, *viz.*

* [7]

(*a*) 2. Roll. Abr. 778. Cro. Eliz. 500. Dyer, 249. a.

(*b*) 2. Inſt. 360. 681. 5. Co. 14. 11. Co. 66. 74. Plowd. 248. 1. Roll. Rep. 151.

(*c*) Puller *v.* Hutchinſon, T. Jones, 160. S. C. 3. Lev. 95.

" that

"that he whoſe incumbent firſt dies ſhall firſt preſent," for theſe words import, that both the incumbents muſt be living at the time of the union. Now here the king's incumbent was dead before the union, and conſequently a right was veſted in THE CROWN to preſent another; and it would be very hard, and what was never intended by this ſtatute, to deveſt the king of that right by ſuch a union as was made by the archbiſhop in this caſe. Beſides, it may be reaſonably intended that the king is not comprehended in this ſtatute, becauſe the union is to be at the equal expence of both patrons, and by their conſent; and it would be indecent that the king ſhould join with a ſubject in the expence of a commiſſion. It is true, this union creates a new parſonage, and the church being full of the archbiſhop's incumbent, he may claim a right to both; but that can be no objection, becauſe in a *quare impedit* plenarty is no plea againſt the king's right, though given by the ſtatute of *Weſtminſter the Second*, c. 5. which is general, and does not name the king; for if the king is not named, the general words of an act do not bind any prerogative or royal intereſt veſted in him.

11. Rep. 72. 7. Co. 32. 3. Lev. 382.

Upon the whole matter it was admitted, that the words in this ſtatute are general, and that the right of the crown may ſeemingly be bound by them: but though the words are general, yet they ought to be ſpecially conſtrued, to avoid an apparent injury; for the intent of the act was to put things in an ordinary and regular method, and not to deveſt either of the patrons of their reſpective right, and ſuch a conſtruction would be conformable to the intent of the Legiſlature, *viz.* that all unions ſhould be made by the conſent of both patrons, and not to the damage of either; and that the churches ſhould be united when there are two incumbents living, becauſe the ſtatute gives the right of preſentation to that patron whoſe incumbent ſhould firſt die, which might happen to be the king's incumbent; but now, by this union, he is deprived of that ſurviving and contingent right of preſentation, which is an apparent damage done to the crown.

THE COURT was of opinion, that this ſtatute never intended that any union ſhould be made of two churches after an avoidance in one; for by the common law, by which this act muſt be conſtrued, there could be no union but by the * conſent of both patrons; neither could it be made *in præſenti*, but by the conſent of both the incumbents, though the patrons agreed to unite; though it might be made *in futuro* without the conſent of the incumbents. Therefore it would be very hard to conſtrue this ſtatute ſo as to make a union good, where both the churches are not full at the time the union is made; for it is not ſo by the canon law in caſes of preſentation and conſolidation, and it is that law which ſhould direct in this caſe. It is clear, that the king cannot be deveſted of any of his prerogatives by general words in an act of parliament (*a*), but that there muſt be plain and expreſs words for that

* [8]

(*a*) Hob. 143.

purpoſe,

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purpoſe, though all his other rights are no more favoured in law than the rights of his ſubjects; and it is likewiſe clear, that general words in an act of parliament may be qualified by ſubſequent ſentences or clauſes in the ſame ſtatute: but certainly it was never the intent of the Legiſlature by this act to work a wrong to any patron; but if this union ſhould be good, it would deveſt the king of that right which was already veſted in him to preſent to this vicarage; and ſuch a conſtruction of the ſtatute would be a damage not only to THE CROWN, but it may happen ſo to be to ſeveral other patrons. Beſides, in this caſe, there being two benefices united after an avoidance in one, it is plain that *the Archbiſhop* made the union for his own benefit, which is againſt a principle in law.

As to the plenarty which the defendant pleaded to this *quare impedit*, THE WHOLE COURT agreed, that it was not a good plea in bar to the king's right; and that was the principal reaſon why the court of king's bench in *Ireland* gave judgment for the king.

But as to ſome other points there were various opinions.

ALL FOUR OF THE JUDGES held, that the union was not good, becauſe it was made after an avoidance of one of the churches united.

FORTESCUE, *Juſtice*, ſaid, that would be a proper queſtion; AND HELD, that it was good, but that it was not to take effect until after the king had preſented to the church.

EYRE, *Juſtice*, held, that by the union the church united was extinct, and that he did not know in what manner the king could preſent to a church which was extinct.

FORTESCUE, *Juſtice*, held, that the church was not extinct by the union, becauſe it was a ſpiritual act, which did not extinguiſh the church as to the right of either patron; for if one church had been *appendant* and the other *in groſs* before the conſolidation, they would be ſo after it.

PRATT, *Chief Juſtice*. As to the chief point—I think, as now adviſed, that the king will be bound by the general words of this ſtatute, he having no right, in this particular, diſtinct from the right of a ſubject.

*[9] * But, for the reaſons before-mentioned, THE WHOLE COURT agreed, that the judgment in *Ireland* ſhould be affirmed (*a*).

NOTE, There was another objection, *viz* that it ought to have been averred that the archbiſhop was the biſhop of the dioceſe, and the union to have been ſet forth under the ſeal epiſcopal as well as archiepiſcopal. But THE COURT took no notice of it.

(*a*) It was adjourned now, but in *Eaſter Term* following it was argued again, and the judgment was then affirmed. The laſt argument was only upon the ſecond point, the Court having been clearly of opinion upon the firſt (as was admitted by the defendant's Counſel) that the king was bound by the ſtatute. NOTE *in former edition.*

MICHAELMAS

MICHAELMAS TERM,

The Eighth of George the Firſt,

AT

The Sittings

BEFORE

Sir Peter King, *Knt. Chief Juſtice*

OF

THE COURT OF COMMON PLEAS.

Monk *againſt* Graham.

Caſe 5.

ONE *Hackett* bought ſtock to the value of ſeven hundred and fifty pounds in the third ſubſcription in the *South Sea Company*, and received fifty pounds a-year for it, and afterwards ſold it, which by ſeveral meſne conveyances came to the now plaintiff *Mrs. Monk*, who purchaſed it for a thouſand pounds. She, living in the country, entruſted one *Roſſe*, who was an officer of the exchequer, with the minutes, and an order to receive this fifty pounds a-year for her uſe. the ſaid *Roſſe* being then a man of credit, and diſcounting for at leaſt thirty thouſand pounds a-year of the revenue. Afterwards *Roſſe*, pretending that he had a power to ſell the ſaid ſtock, made an agreement in writing with the defendant *Graham* to ſell it to him for nine hundred and ninety-four pounds, and told him the plaintiff would ſign the transfer, but he got another woman to perſonate the plaintiff, and to ſign the transfer (*a*); and at the next opening of the books of the Company he got the ſame transferred to the defendant, and made affidavit of the ſale, and got it entered in the ſaid books, this being required by act of parliament to every transfer, and then he withdrew himſelf out of the kingdom, ſo that he could not be found. The plaintiff hearing that *Roſſe* was withdrawn came to *London*, and demanded the ſtock of the defendant, who told her, that he had bought it of *Roſſe*, and had got the minutes, the transfer, and

If an agent entruſted by a ſtockholder to receive the yearly *dividends* make a fraudulent ſale of the ſtock by means of a pretended power of attorney, and transfer it by perſonating the proprietor, and abſcond, the proprietor may recover the *original price* paid for the ſtock in an action of *trover* againſt the *vendee*.

1. Leon. 158.
1. Wilſ. 8.
2. Stra. 1187.
Salk. 283.
2. Term Rep. 376.
4. Term Rep. 260.

(*a*) By 8. *Geo.* 1. c. 22. this is now made felony without benefit of clergy. See 1. Hawk. P. C. ch. 58.

the

MONK *againſt* GRAHAM.

the affidavit, which were all the conveyance the law could give; and believed, that if ſhe had any title ſhe had nothing to ſhew to make it appear, and therefore ſhe came too late to make any demand on him. Afterwards the defendant, though forbid by the plaintiff, ſold this ſtock for one thouſand and ninety pounds to *T. S.* who ſold it again to *R. W.* for eleven hundred and nine pounds.

And then the plaintiff brought an action of TROVER againſt the defendant.

Allen, 93. 2. Stra. 1178.

And SIR PETER KING, *Chief Juſtice*, notwithſtanding her folly in truſting *Roſſe* with the minutes, which the Counſel for the defendant did much rely on, directed the jury to find for the plaintiff, which they did, and gave her no more than ſeven hundred and fifty pounds damages.

MICHAELMAS TERM,

The Eighth of George the Firſt,

IN

The King's Bench.

1721.

Sir John Pratt, *Knt. Chief Juſtice.*

Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.*
Sir John Forteſcue Aland, *Knt.* } *Juſtices.*

Sir Robert Raymond, *Knt. Attorney General.*
Sir Philip Yorke, *Knt. Solicitor General.*

* The Churchwardens of Biſhopſgate *againſt* Alderman Beecher. Caſe 6.

THE CHURCHWARDENS of the pariſh of *Biſhopſgate* made a tax for the relief of their poor for *a whole year*, which amounted to ſix hundred pounds and upwards, when they ſhould have made only *a quarterly rate*; and the ſame, through inadvertency, was confirmed by *Alderman Beecher*, who was the alderman of that ward; and, afterwards, he, fearing that the churchwardens might collect the whole ſum, and make ſome ill uſe of it, refuſed to grant a warrant to diſtrain for this tax.

If a poor's rate for *a year*, when it ſhould only have been for *a quarter*, be inadvertently confirmed, the Court, on a *mandamus* to the juſtice to grant a warrant to levy the ſame, will order the diſtreſs to be made for only *a quarter* of the whole rate.

The churchwardens thereupon moved the court of king's bench for a *mandamus (a)* to compel him to grant his warrant, and ob-

(a) That a *mandamus* lies in this caſe, ſee Rex *v.* Montague, 1. Seſſ. Caſes, 367. Rex *v.* Mayor of Worceſter, B. R. H. 110. Rex *v.* Dean of Norwich, Carth. 450. Rex *v.* Juſtices of Somerſet, 2. Stra. 992. St. Luke's *v.* Juſtices of Middleſex, 1. Wilſ. 133.

tained

THE CHURCH-WARDENS OF BISHOPSGATE *againſt* ALDERMAN BEECHER.

tained a rule of court for him to ſhew cauſe why a *mandamus* ſhould not be granted (*a*).

THE ALDERMAN, at another day, by his Counſel, ſhewed all the matter before-mentioned for cauſe, &c.

And a rule was made, that he ſhould grant his warrant to diſtrain for the tax for *one quarter* of a year, and no more, for he could not confirm this tax in part; it muſt be for the whole, or for no part (*b*).

(*a*) If the rate be illegal, the juſtices may refuſe to ſign it, and they may return it for cauſe upon a *mandamus* directed to them to ſign it; but as to the ſums or parties aſſeſſed, they have nothing to do with it, the remedy is by appeal; and though the *Aldermen of Dorcheſter* refuſed to ſign a rate, becauſe of inequality, yet THE COURT granted a *mandamus*, and after a return a *peremptory mandamus*, and then *an attachment*, in order that the parties grieved might appeal. Cited by the Court in this caſe of Beecher's, 16. Vin. Abr. 429. pl. 5.—NOTE *to former edition.*

(*b*)

Caſe 7. The King *againſt* Journeymen-Taylors of Cambridge.

Monday, 6 *November* 1721.

An indictment againſt *a taylor*, with the addition of *yeoman*, is good.

2. Inſt. 608. 3. Hawk. P. C. ch. 23. ſ. 114.

ONE *Wiſe*, and ſeveral other journeymen-taylors, of or in the town of *Cambridge*, were indicted for *a conſpiracy* amongſt themſelves to raiſe their wages; and were found guilty.

IT WAS MOVED *in arreſt of judgment*, upon ſeveral errors in the record,

FIRST, That the defendants, having the addition of "*yeomen*," are, notwithſtanding, charged with a conſpiracy not to work as "*journeymen-taylors*," which is a repugnancy.

It was anſwered, that "yeoman" is a good addition, for a yeoman may be a taylor.

THE COURT held, that there was no inconſiſtency between the addition of "yeoman" and the addition of "taylor."

The caption of an indictment thus, "*At a* "*general quarter* "*ſeſſions of the* "*peace*," omitting "*of our lord* "*the king*," is good; for it ſhall be intended the *king's peace*.

Dyer, 76. 2. Lev. 175. 1. Sid. 422. 4. Hawk. P. C. ch 25. ſ. 122. 3. Burr. 1903.

SECONDLY, The caption is not good, being "*ad general. quartial ſeſſ. pacis, &c.*" omitting "*domini regis*" after "*pacis.*" This exception has been ſeveral times held fatal, and is very different from the caſes where they are omitted after the words "*juſt. dict. domini regis ad pac. in com. præd. conſervand. aſſign.* (*a*)." In *Hilary Term*, in the firſt year of *Queen Anne*, and in *Hilary Term* in the eleventh year of *Queen Anne*, two indictments were quaſhed for this exception.

It was anſwered, that this objection has been often over-ruled, for it muſt be intended the king's peace, and that the caſe in *Ventris* (*b*) has been denied for law.

THE COURT was of the ſame opinion, and ſaid, that of late years this objection had never prevailed.

(*a*) 1. Sid. 175. Keb. 656 885. Vent. 39. (*b*) Office of the Clerk of the Peace, 16.

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MICHAELMAS TERM,

The Eighth of George the Firſt,

1721.

IN

The King's Bench.

Sir John Pratt, *Knt. Chief Juſtice.*

Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.*
Sir John Forteſcue Aland, *Knt.* } *Juſtices.*

Sir Robert Raymond, *Knt. Attorney General.*
Sir Philip Yorke, *Knt. Solicitor General.*

* Stratford *againſt* Neale. Caſe 1.

Friday, 17 *November*, 1721 (*a*).

Eaſter Term, 3. *Geo.* 1. *Roll* 184.

WRIT OF ERROR on a judgment given in the court of king's bench in *Ireland* (*b*).

The caſe was thus: One *Neale* libelled in THE SPIRITUAL COURT there for *two third parts* of the tithes due to him for *dry cattle* fed in ſuch a pariſh, &c.

If a parſon libel in the ſpiritual court for *two third parts* of the tithes of dry cattle, and, on a declaration in prohibition, the defendant plead a right to *two integral parts* of the tithes of dry cattle, THE VARIANCE between the libel and the declaration is not material.—Yelv. 79. 6. Com. Dig. "Prohibition" (K.). 2. Mod. 289.

(*a*) This caſe was argued once before, *viz. Friday*, 27 January 1720, and five more exceptions were taken; which ſee in Forteſc. Rep. 350. The caſe at large, with both the arguments, and the opinion of the Court, are in Stra. 482.—NOTE *to former edition.*

(*b*) The writ of error to the king's bench in *England* on judgments given in the courts in *Ireland* is taken away by 23. *Geo.* 3. See Mr. Chriſtian's edit. 1 vol. Bl. Com. 104. and Mr. Serjeant Runnington's fifth edit. of Hale's Com. Law, vol. ii. page 7 to 18. note (A).

STRATFORD *againſt* NEALE.

The defendant ſuggeſted, for *a prohibition*, that the cattle for which thoſe tithes were demanded were *beaſts of the plough*, and other *dry cattle* fed in the ſaid pariſh with hay and ſtubbles of corn, for which tithes had already been paid.

A PROHIBITION was thereupon granted; and that the right might come in queſtion, *Stratford* was ordered to declare upon the prohibition; which he did, and in the ſame manner as before he had ſuggeſted, and concluded his declaration, that the defendant had proceeded in the ſpiritual court after a prohibition delivered, &c. *et contra prohibitionem, &c.*

The defendant pleaded, that the cattle for which he had demanded the ſaid tithes were not ſuch as the plaintiff had ſet forth in his declaration, nor fed with ſuch hay and ſtubbles for which tithes had already been paid: and then pleaded, that he had a right to *two integral parts* of the tithes of all dry cattle fed in that pariſh; and that he had not proceeded *contra formam prohibitionis, &c.*

Upon this they were at iſſue; and the defendant had a verdict and judgment for *a conſultation*; which was awarded.

* [2] * On this judgment the now plaintiff brought *a writ of error.*

IT WAS INSISTED for him, that there was *a variance* in the pleadings, and that the verdict would not ſupport this judgment.

FIRST, As to *the variance* in the pleadings, *viz.* the plaintiff in the ſpiritual court had by his libel demanded *two third parts* of the tithes due to him for dry cattle, &c. and being defendant in the action, he claimed a right to *two integral parts* of the tithes, &c. ſo that his plea varies from his libel, and therefore a conſultation ſhould not be awarded, becauſe that gives him a power to ſue for any thing not in the libel; therefore he has made no ſufficient title.

TO WHICH *it was anſwered*, that the awarding *a conſultation* is no more than giving the defendant liberty to proceed on his former libel in the ſpiritual court, and conſequently if there be any variance between the libel and the plea, it is no cauſe to reverſe the judgment, becauſe the conſultation gives him no new power to ſue for any thing, but only to proceed on that very libel which he had already exhibited; that it is a matter of appeal, not of prohibition: but however that there could be but one part remaining.

Leon. 115. 13. Co. 58. 89.

THE COURT was of opinion, that the awarding *a conſultation* is no more than ſetting aſide the *prohibition*, and giving the plaintiff in the ſpiritual court liberty to proceed on his libel; and that *the variance* between his *libel* and his *plea* is not material; for though in the one *two third parts* are demanded, and in the other *two integral parts*; yet that muſt be underſtood *ſecundum ſubjectam materiam.*

SECONDLY,

THIRDLY, No crime appears upon the face of this indictment, for it only charges them with a conſpiracy and refuſal to work at ſo much *per diem*, whereas they are not obliged to work at all by the day, but by the year, by 5. *Eliz.* c. 4.

A conſpiracy among journeymen to refuſe to work under certain wages is an indictable offence. Poſt. 320.

It was anſwered, that the refuſal to work was not the crime, but the conſpiracy to raiſe the wages.

THE COURT. The indictment, it is true, ſets forth, that the defendants refuſed to work under the wages which they demanded; but although theſe might be more than is directed by the ſtatute, yet it is not for the refuſing to work, but for conſpiring, that they are indicted, and a conſpiracy of any kind is illegal, although the matter about which they conſpired might have been lawful for them, or any of them, to do, if they had not * conſpired to do it, as appears in the caſe of *The Tubwomen v. The Brewers of London* (*a*).

1. Bl. Rep. 392. 2. Hawk. P. C. ch. 72. ſ. 2.

* [12]

FOURTHLY, That this fact being laid in the town of *Cambridge*, it did not appear by the record in what county *Cambridge* was, which it ought to do, becauſe there are other towns of that name in *England*, *viz.* in *Glouceſterſhire*; and ſo it is a miſ-trial: for there is no more reaſon to award the *venire* to the ſheriff of *Cambridge* than of any other county. The *venire facias* is awarded to the ſheriff of the county of *Cambridge*, commanding him to ſummon a jury "*de vicineto villæ Cant.*" In the margin of the indictment it is *villa de C.*; in the indictment the *venue* is alledged only *apud villam de C.*; and though the *certiorari* to remove it is directed "*Juſt. domini regis de villa C. in com. noſtro C.*" this error is not helped by naming the county in the *certiorari* to remove the indictment, becauſe that writ is only an order of this court. Neither ſhall it be intended that *Cambridge* is in the county of *Cambridge*, becauſe this is a criminal caſe, and intendments are never allowed in proſecutions of this nature.

An indictment, laying the fact in the town of *Cambridge*, without ſtating in what county, held good. Kely. 15. 1. Salk. 238. Stra. 44. 1. Burr. 333. 4. Hawk. P. C. ch. 25. ſ. 83.

It was anſwered, that the fact being laid in the town of *Cambridge*, it ſhall be intended that the town is within the county of *Cambridge*, for which *Long's Caſe* (*b*) is an authority in point.

THE COURT. If a *venire facias* be directed to the ſheriff of *Cambridge* to return a jury, and he returns one *de vicineto Cantabrigiæ*, it is good; for *Cambridge* being mentioned in ſeveral acts of parliament, the Court muſt take notice of ſuch acts, and upon ſuch a return will intend that *Cambridge* is in the county of *Cambridge*. In the caſe of *Withers v. Warner* (*c*), in *Hilary Term*, in the ſixth year of *George the Firſt*, we took judicial notice that "*London*" and "the city of *London*" are all one. The *certiorari* is directed, "To the juſtices of our lord the king of "the town of *Cambridge*, in our county of *Cambridge*," and returned by the juſtices of the vill in the county of *Cambridge*; ſo that it will be a very foreign intendment to ſuppoſe the *vill* to be out of the county.

(*a*)
(*b*) 5. Co. 120.
(*c*) 1. Strange, 309.

FIFTHLY,

An indictment againſt journeymen-taylors for conſpiring to raiſe their wages is good, although it do not conclude *contra formam ſtatuti*.

1. Vent. 13. 1. Sid. 409. Comb. 371. Salk. 460. Dougl. 441. 4. Com. Dig. "Indictment" (G. 6.). March, 124. Cro. Eliz. 108. Sid. 342. 34. *Hen.* 6. 49, 50. pl. 17. Lev. 153. 2. Keb. Rep. 867.

FIFTHLY, This indictment ought to conclude *contra formam ſtatuti*; for by the late ſtatute 7. *Geo.* 1. c. 13. journeymen-taylors * are prohibited to enter into any contract or agreement for advancing their wages, &c And the ſtatute of 2. & 3. *Edw.* 6. c. 15. makes ſuch perſons criminal *(a)*.

It was anſwered, that the omiſſion in not concluding this indictment *contra formam ſtatuti* is not material, becauſe it is for *a conſpiracy*, which is an offence at common law. It is true, the indictment ſets forth, that the defendants refuſed to work under ſuch rates, which were more than enjoined by the ſtatute, for that is only two ſhillings a-day; but yet theſe words will not bring the offence, for which the defendants are indicted, to be within that ſtatute, becauſe it is not the denial to work except for more wages than is allowed by the ſtatute, but it is for *a conſpiracy* to raiſe their wages, for which theſe defendants are indicted. It is true, it does not appear by the record that the wages demanded were exceſſive; but that is not material, becauſe it may be given in evidence.

THE COURT. This indictment need not conclude *contra formam ſtatuti*, becauſe it is for *a conſpiracy*, which is an offence at common law.

So the judgment was confirmed by THE WHOLE COURT *quod capiantur*.

(*a*) 1. Saund. 250. Wm. Jones, 379.

Caſe 8. Sir Hans Sloane, Preſident of the College of Phyſicians, *againſt* Lord William Pawlett *(a)*.

Saturday, 25 *November* 1721.

If A STATUTE enact, that the lord-lieutenants of the ſeveral counties ſhall charge "any perſon with horſe "and arms in "the county "where his eſtate ſhall lie," towards the maintenance of THE MILITIA, the COLLEGE OF PHYSICIANS are not exonerated from this charge by A CHARTER exempting all the members thereof from "bearing or providing "arms to ſerve in the militia in *London* and *Weſtminſter*."

TRESPASS for entering his houſe and taking a ſilver tankard. The defendant pleaded *not guilty*.

The ſpecial matter given in evidence was, a juſtification under a warrant from the lieutenancy of *Middleſex* to levy eight pounds by diſtreſs, &c. for not appearing, &c. being duly ſummoned, and for not finding *a horſe* to ſerve in THE MILITIA.

This cauſe being at iſſue, and coming on to a trial before PARKER, *Chief Juſtice* (now LORD CHANCELLOR), he ordered it to be made a caſe, and to be referred to the opinion of the court of king's bench, which was accordingly done.

THE CASE was thus ſtated: *Lord William Pawlett* and others were deputy-lieutenants of the county of *Middleſex*, and, as ſuch,

(*a*) This caſe was twice argued, and here both arguments are blended together. — NOTE *to the former edition.*

had

had power, by the ſtatute 13. & 14. *Car.* c. 3. to call together perſons, from time to time, and to arm and array them, as by the ſaid ſtatute is directed, and to charge him who has an eſtate of five hundred pounds a year in poſſeſſion, or ſix thouſand pounds in goods and money, with horſe, horſeman, and arms, and ſo proportionably. By the ſame ſtatute power is given to the lord-lieutenants and their deputies to inflict a penalty not exceeding twenty pounds upon thoſe who are charged, &c. and who neglect to find a horſe, &c. and to ſerve in perſon, or to provide others to ſerve in their places, which penalty is to be levied by warrant, by the diſtreſs and ſale of goods, &c.; that the ſaid deputy-lieutenants cauſed the plaintiff, *Sir Hans Sloane*, preſident of the *College of Phyſicians*, to be ſummoned to appear in perſon, or to find a horſe and arms for his eſtate at *Chelſea* of five hundred pounds land in poſſeſſion, which is within ſeven miles of *London*, for another to ſerve in the militia, &c. in his place, which he refuſed, inſiſting on a charter of exemption granted to the *College of Phyſicians* by *King Charles the Second*, dated the twenty-ſixth day of *March*, in the fifteenth year of his reign, exempting "all members from bearing or providing "arms to ſerve in THE MILITIA in *London* and *Weſtminſter*, or the "ſuburbs, or within ſeven miles thereof, and that every deſignation "or appointment to the contrary ſhall be utterly void, &c." by which charter another is recited, which was granted to the ſaid College by *King Henry the Eighth*, and another by *King James the Firſt*, exempting them from ſeveral ſervices. Thereupon the plaintiff, *Sir Hans Sloane*, was fined eight pounds, and a warrant was granted by *Lord Pawlett* to levy the ſame by diſtreſs and ſale of the plaintiff's * goods; and accordingly the officer, to whom the warrant was directed, entered the houſe, and diſtrained a ſilver tankard, for which the plaintiff brought this action of treſpaſs, and the defendant juſtified, &c.

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* [13]

Upon arguing this caſe three points were made.

THE FIRST was concerning the king's power to grant charters of exemption from the penalties or charges impoſed on the ſubject by act of parliament.

THE SECOND was, Admitting the king had ſuch a power, then whether there were ſufficient words in this charter to make ſuch an exemption.

THE THIRD was, Whether the juſtification under this warrant was good.

BAINES, *for the plaintiff*, argued,

FIRST, That the king has power, by his charter, to exempt any ſubject from the penalties of this ſtatute ſeems very plain, becauſe, before this ſtatute was made, the power of THE MILITIA was in the king, and it was originally ſo at common law; and this ſtatute was made to eaſe the crown of a labour, and to put things in an ordinary form, but not to deprive the king of that power which he had before. And as a parallel caſe, the king may exempt any ſubject from

See Dyer, 52. 211. Plow. Com. 226. 501. 6. Rep. 7. 7. Rep. 63. Cro. Car. 428. Vaugh. 382. 3. Lev. 392.

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the payment of taxes impoſed by act of parliament; as for inſtance, he might exempt him from payment of *tenths* and *fifteenths*: and though it may be objected that a charter of exemption of all men in general from the penalties of the militia act would be totally to elude the act itſelf, yet it will not follow from thence, that a particular charter of exemption of a corporate number of men will not be good; for the firſt is but merely poſſible, and a thing which no king in his right ſenſes would do; but the ſecond is frequently done. It is true, this exemption may be ſaid to do an injury to others, by laying a heavier charge on their lands, but it is more properly a charge on the perſon in reſpect of his lands, and therefore it is a good exemption. Now admitting that the power of THE MILITIA was entirely in the crown before the making this ſtatute, as certainly it was, and ſo declared to be by the ſtatute 13. *Car.* 2. c. 6. (*a*), it is as certain, that the king might exempt any of his ſubjects * from ſerving in it; and if ſo, then the ſtatute has made no alteration of his power. The old commiſſions of array (*b*), on which this of the lieutenancy is founded, were to array all thoſe who were able to ſerve, and that thoſe who were not able to ſerve in perſon ſhould contribute to thoſe who were; yet the king might exempt any of his ſubjects, unleſs in caſes of apparent danger, from this ſervice. Tenants by knight-ſervice were the firſt militia of this kingdom, it being a tenure inſtituted for the defence thereof; for thoſe tenants, as my LORD COKE tells us (*c*), were always to be armed for that ſervice, yet the king could exempt any of them from attending, unleſs it was where the danger was apparent, as to ſuppreſs a rebellion, or to repel an invaſion; in which caſes none could be exempted. So the king might exempt particular perſons from being jurymen, unleſs in a writ of right (*d*). It is true, he cannot exempt a knight from being of the jury, where a peer is concerned in the trial as a party; and the reaſon is, becauſe by ſuch an exemption there would be a failure of juſtice; and the ſubject hath a greater intereſt in juries than he hath in THE MILITIA (*e*). Now as to this ſtatute itſelf, it ſhews that the parliament did not intend by any implication to deveſt the king of any right or prerogative which he had before it was made; for the clauſe which concerns this matter is, "that the "king may, from time to time, iſſue out commiſſions of lieute-"nancy, and that the lieutenants may array perſons, and form "them into companies, and conduct and employ them within "ſuch places for which they ſhall be commiſſioned, &c. as the "king ſhall direct;" which laſt words ſhew, that THE MILITIA is ſtill to be under his direction; and the beginning of this clauſe is, "that he may iſſue out commiſſions for the ſeveral counties,

* [14]

(*a*) Repealed by 2. *Geo.* 3. c. 20.

(*b*) Their form was ſettled in parliament anno 5. *Hen.* 4. Cotton's Abridgment, 428. Ruſhworth's Collection, 68. They continued in uſe till the end of *Queen Elizabeth's* time, when commiſſions of lieutenancy were iſſued. 4. *Hen.* 6. pl. 6. 21. *Edw.* 4. pl. 56. Vaugh. 349. Lambert, 135. a. Wilkins's Saxon Laws, 217.

(*c*) Co. Lit. 68. 72. 76. 4. Inſt. 492.

(*d*)

(*e*) See 24. *Geo.* 2. c. 18. Poſt. 17. *ſeriatim*.

"cities,

"cities, and places of *England* and *Wales*, *&c.*" but there is no time limited when; ſo that he is not obliged to iſſue them out every year, nor for all the counties, for he may do it for one county, and no more; and if in one county, he may exempt ſome perſons there from this ſervice, for there are no expreſs words in this ſtatute to deveſt the king of ſuch power; and it is certain, that in the moſt minute caſes of the king's prerogative it cannot be taken away by any general words in an act of parliament *(a)*. Now the power which the lieutenants have by this ſtatute is only a bare authority "to arm, array, and form perſons into com-"panies, &c.;" and as this power is given to *them by commiſſion from the king, ſo he may ſuſpend that power *ad libitum*; and it is certainly ſuſpended by this charter granted to THE COLLEGE OF PHYSICIANS, becauſe it exempts them from "all "powers in the ſaid act," which muſt be from the actual ſervice in THE MILITIA in perſon, and from providing another to ſerve in their place, the one being the primary, and the other the ſecondary ſervice. Beſides, this ſtatute was made to relieve, and not to charge the ſubjects; and it is abſolutely neceſſary that a power of exempting perſons ſhould be lodged ſomewhere; it is daily done by the lieutenants themſelves; and it is done by virtue of their commiſſion; and if they may exempt, and not the king, this abſurdity would follow, *viz.* that the derivative power is greater than the power from whence it is derived. If the king ſhould be included within the general words of this act, yet in this charter there is a ſpecial *non obſtante* of any law or ſtatute to the contrary; and when an act expreſsly declares that the king's grant ſhall be void, though there be a clauſe *non obſtante* in the patent, yet the king may diſpenſe with ſuch an act, if there be in the patent a clauſe *non obſtante* of that ſtatute *(b)*. But there are many inſtances of the king's power of exemption, *viz.* the province of *Canterbury* granted the tenths, &c. to the king, and appointed a certain perſon to collect them *(c)*; and the convocation ordered, that no privileged perſon ſhould be exempted from being a collector, yet one who had a charter of exemption from the king was adjudged, by virtue thereof, to be exempted. The ſubſidy bills *(d)* take notice, that no letters patent of exemption ſhall be taken to excuſe or exempt any perſon from the taxes, or from the charge of any ſum appointed to be paid by thoſe acts; and that all *non obſtante's* in bar of any act of parliament for the ſupply or the aſſiſtance of the king are declared to be void. Now ſince the Legiſlature thought it proper to mention ſuch powers of exemption, and to prohibit the effects thereof, this ſeems to prove that ſuch powers would have remained in the king, if they had not been prohibited to be put in execution;

* [15]

(a) 11. Rep. 74. Hob. 146. Moor, 542. 3. Lev. 382. Cro. Car. 428. Plowd. Com. 236. 501 Vaughan, 351. Co Lit. 99. a. Dy 269. a. b.

(b)

(c) Bro. "Exempt." pl. 9. 14. Bro. "Patent," pl. 16. Dyer, 52. 269. 2 *Rich.* 3. pl. 12. 2 *Hen.* 7. 6. 7. Co. 14. 36, 37. 12. Co. 18. Hob. 214. Plowd. Com. 457. 501. a. b. Hardr. 443. Vaugh. 330. Sid. 6, 7. Vaugh. 349.

(d) 22. *Car.* 2. c 3. 6. & 7. *Will.* 3. c. 18. 7. & 8. *Will.* 3. c. 18.

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though it does not ſeem abſolutely neceſſary to mention thoſe powers in theſe acts, becauſe the ſubſidies were given to the crown for particular uſes mentioned in the acts themſelves; ſo that if ſuch patents of exemption had not been named in thoſe ſtatutes, the king could not have diſcharged any man from the payment of thoſe ſubſidies (*a*), becauſe they muſt be applied to thoſe uſes for which they were given. As to this charter granted to THE COLLEGE OF PHYSICIANS, it has been allowed and acquieſced under ever ſince it was firſt granted to this very time, which is a ſtrong preſumption that it is good; and the ſtatute 1. *Geo.* 1. c. 3. which takes notice that ſuch people who are exempted from ſerving in THE MILITIA ſhall not be included in that act, is a ſtrong proof that ſome are exempt. * Neither is any particular perſon damnified by this exemption, but all people alike, for it impoſes no new charge on them, but leſſens the old charge as to ſome particular perſons exempted; neither is it any manner of charge on the lands, for the ſtatute requires a perſonal appearance of the people armed to defend the kingdom, and that when they appear, a computation may be made of what ſhall be ſufficient to furniſh them to ſerve in THE MILITIA.

* [16]

SECONDLY, The next point is, Whether there are ſufficient words in this charter to exempt the phyſicians from finding horſe and arms, as well as from their perſonal ſervice in THE MILITIA; and as to that matter it is to be obſerved, that the charter recites the ſtatutes of *Henry the Eighth* and *James the Firſt*, and that the regulations therein wanted ſome new exemptions; and therefore it exempts the phyſicians from "watch and ward," and from "ſerving on juries, or bearing or providing arms to ſerve in THE "MILITIA." It is certain, that no man is bound to bear arms for another; he may do it voluntarily, or by an agreement, but not otherwiſe; and if the word "bearing" is ſufficient to exempt a man from the perſonal ſervice, the word "providing" muſt be nugatory, if it do not exempt him from being contributory to the finding arms; and ſuch a conſtruction would make this charter of no effect.

THIRDLY, The next thing to be conſidered is, Whether the defendant can juſtify under this warrant, it being to diſtrain for a penalty impoſed for not bearing or finding arms to ſerve in the militia. Now this is offered by the defendant as one entire cauſe of juſtification, and as ſuch it muſt be good for the whole; for if one part be good and the other bad, then the whole will be naught; and as to that matter, one part is not good, and therefore an entire penalty as to both can never be impoſed (*b*); for if it ſhould, then certainly the puniſhment would be againſt law as to that part which is not good. Now one of the cauſes for which this penalty was impoſed is naught, *viz.* "for not

(*a*) 3. Mod. 56. (*b*) Cro. Eliz. 434. 11. Co. 42. 1. Saund. 27.

"bearing

"bearing arms," when by the ſtatute no man is bound to bear arms, if he find another to ſerve in his place (*a*).

ON THE OTHER SIDE *it was argued* (*b*), that the power which the king had to exempt the ſubject from the payment of the *tenths* and *fifteenths* granted to him by act of parliament does not come up to this caſe, becauſe the king had an entire intereſt veſted in him as to thoſe things. So where the province of *Canterbury* granted the tenths to the crown, and appointed one to collect them, and the convocation * ordered that no privileged perſon ſhould be exempted from being a collector, yet one who had a charter of exemption from the king was excuſed; this likewiſe does not concern the caſe now in queſtion, becauſe the convocation had not power to make any man the king's purveyor; and THE BILL OF RIGHTS, in the third year of *Charles the Firſt*, entirely condemns all thoſe exemptions. It has been admitted on the other ſide, that the king could not grant theſe charters of exemption in extraordinary caſes; and that he cannot exempt *a knight* from being *a juryman* where a peer is a party in the cauſe (*c*); and certainly it cannot be pretended that this can be ſo much for the good of the publick as the defence of the kingdom by THE MILITIA; and there is a great difference between exemptions and excuſing perſons at diſcretion. It is true, the king may exempt men from *pontage* or *murage*, becauſe ſuch exemption may be lawfully made in oppoſition to the authority of thoſe who take upon themſelves to build bridges, &c. but the king cannot exempt them from being contributory towards the ſupport of old bridges, becauſe they were ſubject to ſuch contribution prior to any exemption (*d*); ſo in the principal caſe the charge was veſted prior to the charter of exemption, and for that reaſon it cannot be good. There is likewiſe another reaſon why it cannot be good, and that is, becauſe it is to exempt men from that charge which the law has provided for the public ſafety of the kingdom, in which every man hath a benefit; and therefore it is reaſonable that every man ſhould be contributory to it.

(*a*) The remainder of the argument for the plaintiff was what SERJEANT PENGELLEY ſaid in Hilary Term 1722. PENGELLEY divided the caſe into three points: 1ſt, What power the king had in *the militia* antecedent to the acts of 13. *Car.* 2. c. 6. and 13. & 14. *Car.* 2. c. 3. 2dly, What alteration had been made by thoſe acts. 3dly, Whether the words of exemption in the charter are ſufficient.—NOTE *to former edition.*

(*b*) By REEVES firſt, then by WEARG. And what is here reported to be ſpoken to the firſt and third points for the defendant was ſaid upon the laſt argument. REEVES as to the firſt point: The prerogative of the king relating to diſpenſations has of late years been diſallowed; and it is expreſsly declared by THE BILL OF RIGHTS, 1. & 2. *Will. & Mary*, c. 2. that ſuch diſpenſations are void. No power of exemption is reſerved to the king by 13. & 14. *Car.* 2. c. 3. *Goodwin v. Hales*, which allowed a diſpenſation of the Teſt Act, and many other caſes, have of late years been denied for law. However, if this charter were a good exemption in point of law, yet it was only ſo during the life of the king who granted it, but will not bind his ſucceſſors.—NOTE *to former edition.*

(*c*) By 24. *Geo.* 2. c. 18. "No chal-
" lenge ſhall be taken by a peer or lord
" of parliament to any panel of jurors,
" for want of a knight being returned in
" ſuch panel, nor any array quaſhed by
" reaſon of any ſuch challenge taken after
" that time."—See 4. Hawk. P. C. ch. 43. ſ. 4.

(*d*) Plowd. 487. 12. Co. 29. W. Jones, 106. 286.

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AS TO THE SECOND POINT; that the words of this charter exempt the phyſicians from "bearing or providing arms to ſerve in "THE MILITIA," which ſeems to be only a perſonal diſcharge, and that ſhall be intended by the word "bearing," and from furniſhing himſelf with arms by the word "providing;" but he is not diſcharged from being contributory to find arms for another to ſerve in THE MILITIA. Beſides, the king's charter cannot exempt a man from a thing which concerns the whole right of the ſubjects (*a*), as this ſtatute does, for it is for the public ſafety of all men. It is true, he may exempt men from any thing which concerns his private right, or which is a branch of his prerogative, or wherein he himſelf is principally concerned; but it does not follow, that becauſe he may grant ſuch exemptions, therefore he may exempt where the whole community are concerned. * Now this ſtatute does not bind any man to a perſonal ſervice in THE MILITIA, nor is it a charge on the perſon, but only in reſpect of his lands; therefore where a man is protected in the poſſeſſion and quiet enjoyment of his lands, he ought in reaſon, as well as in law, to be contributory to the charge of ſuch protection.

* [18]

THE LAST OBJECTION was to the warrant, *viz.* that the defendant could not juſtify under this warrant, &c.; but it was argued, that the warrant was good to levy the penalty for not "bearing or providing arms." It had been otherwiſe if it had been for not "ſerving or finding one to ſerve in THE MILITIA," becauſe he who ſerves is not to contribute to the finding another to ſerve; but by the warrant the penalty was to be levied for not appearing, being duly ſummoned, as well as for not "bearing "or providing arms to ſerve;" ſo that upon the whole matter this is a good warrant, and by conſequence a good juſtification under it.

BAINES *in reply*. The bill of rights declares only ſuch diſpenſations ſhall be void, which plainly proves a precedent right in the crown to grant diſpenſations; and that act does not take away any right the king had of granting diſpenſations, but in ſuch caſes only where a *non obſtante* was neceſſary to be in the charter. And in many caſes the king may grant diſpenſations without a *non obſtante*.

THE COURT upon this firſt argument declared this to be a cauſe of great difficulty and conſequence, as concerning the prerogative of the king, and the general right of the ſubject; and for that reaſon it ought not to be determined upon *a caſe ſtated*, becauſe upon ſuch a proceeding the judgment of the Court would be final, and not to be avoided by the party who ſhould think himſelf aggrieved, either by writ of error or appeal.

THE COURT, therefore, propoſed, that both parties ſhould conſent to make it *a ſpecial verdict*, and that it might be argued once more before judgment was given; upon which a writ of error

(*a*) Cro. Eliz. 447. 449.

might

might be brought in parliament by either ſide againſt the judgment, and there to be finally determined.

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THE CHIEF JUSTICE, however, upon this firſt argument, was of opinion, that the king by his prerogative could not diſpenſe with an act of parliament which was made for the public good of the whole nation. But the queſtion in this caſe was, whether this ſtatute had deveſted the king of any part of his prerogative, or whether it was made to eaſe him of the care of arraying THE MILITIA, and entruſting the lieutenants and other officers therewith; for if it was, then it did not deveſt him of any authority he had before the act. Now he was of opinion, that this charter did not exempt the phyſicians from being contributory to the finding men to ſerve in THE MILITIA, though probably it might exempt them from any perſonal appearance upon a ſummons duly ſerved. But admitting that he might exempt them * from perſonal duties, yet it cannot be inferred from thence, that he might exempt them from being contributory to others to perform thoſe duties which are required by an act of parliament, eſpecially where the ſubject has an intereſt that ſuch duties ſhould be performed, or a loſs if they ſhould not; and the better opinion ſeemed to be, that the king could not exempt in ſuch caſes. That in the principal caſe, the contribution to be made to the finding a man with arms to ſerve in THE MILITIA is a charge upon the lands as well as on the perſons of the owners; and if this charter of exemption ſhould be good, it would encreaſe the charge on all the lands of perſons not exempted, which would be a very great damage to ſuch perſons, becauſe the phyſicians who are exempted are a conſiderable body of men in every county; for which reaſon it would be very hard if the king had power to leſſen the tax impoſed upon one man, and charge it upon another. Beſides, the king cannot exempt in any caſe where the ſubject has an intereſt; as where particular perſons are bound by preſcription or tenure to repair bridges, the king cannot exempt them from repairing, becauſe all the ſubjects have a common benefit to paſs and repaſs over public bridges.

* [19]

It was adjourned for a farther argument (*a*).

(*a*) It does not appear in any of the Reporters, that this caſe was ever moved again.—See Rex v. John Tubbs, Cowp. 512.

The King *againſt* Hutchinſon, Mayor and Aldermen of Carliſle.

Caſe 9.

MANDAMUS to the mayor and common-council of the borough of *Carliſle*, to reſtore *John Sympſon* to the office of a capital burgeſs of the ſaid borough, &c.

If the burgeſs of a corporation *bribe* a freeman to give his vote for the election of a mayor, the corporation, on his being ſummoned to anſwer this charge and refuſing to appear, may *diſfranchiſe* him, although he had not been convicted of the offence at common law.—S. C. poſt. 99. S. C. Fort. 203. 9. Co. 99. Carth. 173. Ld. Ray. 1283. 1. Stra. 557. 1. Burr. 339. 2. Burr. 723. 4. Burr. 1999. Eſp. Digeſt, 677.

THE KING *against* HUTCHINSON, MAYOR AND ALDERMEN OF CARLISLE.

They return the charter of incorporation, with a power to the mayor and aldermen to remove any capital burgeſs for any *miſdemeanor*, and then ſet forth an amotion by them for *bribery* at an election, &c. for mayor of the corporation.

Two points were made in this caſe.

FIRST, Whether the offence for which he is removed be *indictable* at common law.

SECONDLY, Whether, if it be ſo, the corporation, who have expreſsly a power to remove, can make ſuch removal without a precedent conviction.

THE COUNSEL *for Sympſon* inſiſted, that this was not a ſufficient cauſe to remove him, becauſe *bribery* is a crime puniſhable at common law; and it is againſt MAGNA CHARTA to remove him from his freedom before he is convicted of the crime. If the law ſhould be otherwiſe, what ſecurity can any man have againſt the inſults of power: but it is plain, and ſo it was adjudged in *James Baggs' Caſe* (*a*), that a freeman ſhall not be disfranchiſed, unleſs it be by charter or preſcription, if he be not convicted in due form of law. And where he may be disfranchiſed by * charter or preſcription, and without conviction, it muſt be for an act againſt his duty and oath relating to his office, or not doing his office; as a juſtice of peace not attending the ſeſſions, or where a judicial officer is a common drunkard, or for any other miſdemeanor merely againſt the duty of his office, and which is no crime at common law; for there is a difference between the doing an unlawful act, and the not doing his duty relating to his office, the one being a crime, and the other only a contempt.

* [20]

PRATT, *Chief Juſtice*, and POWYS, *Juſtice*, held, that there ought to have been a previous conviction.

But EYRE, *Juſtice*, and FORTESCUE, *Juſtice*, held, that this offence being plainly againſt his duty and oath of burgeſs, the corporation might remove him without conviction.

And THEY ALL AGREED, that a burgeſs may be removed for an offence for which no indictment will lie.

PRATT, *Chief Juſtice*. If a burgeſs be convicted upon an indictment for an offence at common law, this Court may order, as part of the puniſhment, that he be disfranchiſed.

EYRE and FORTESCUE, *Juſtices*, denied it.

Adjournatur (*b*).

(*a*) 11. Co. 93.

(*b*) The whole Court were of opinion, that this was a good return without any conviction at law; though he might have been firſt convicted at law; for though it be an offence indictable at common law, yet being alſo a great offence againſt the duty of his office, the corporation have a juriſdiction, there being an expreſs power in the charter to remove. S. C. Fort. 200.—See alſo S. C. poſt. 99.

Lord

Lord Coningſby's Caſe. Caſe 10.

On granting a trial at bar in ejectment by a peer, the Court will not oblige him to give *ſecurity for coſts*, or *waive his privilege*.

LORD CONINGSBY brought an ejectment againſt ſome of his tenants, and moved for a trial at bar.

The defendants, by their Counſel, thereupon moved, that * the plaintiff being A PEER OF THE REALM, and conſequently not to be *attached* if the verdict ſhould be againſt him, might be obliged to make ſome reſponſible perſon to be his leſſee, or otherwiſe that he would waive his privilege.

But THE COURT rejected the motion; for if the plaintiff was not worth anything, he could not be obliged ſo to do; and it would be unreaſonable that his peerage ſhould be a loſs to him, ſince every ſubject has a right by birth to ſue in the king's courts, where no diſtinction is to be made of perſons (*a*).

S. C. 1. Stra. 548. 10. Mod. 383. Ld. Ray. 697. 4. Mod. 379. 1. Stra. 681. Hullock on Coſts, 445.

(*a*) But ſee Smith v. Parks, 10. Mod. 383.

*[22]

* Mr. Liſter's Caſe. Caſe 11.

17 November 1721.

If a huſband and wife agree to live ſeparate, and during this agreement the huſband take her violently into his cuſtody, the Court, on *habeas corpus*, will ſet her free.

MR. LISTER was married to *Lady Rawlinſon*, a widow, who had, before her marriage with *Liſter*, ſettled her eſtate in her own power, and out of his controul. Afterwards, there being ſome diſagreement between them, he, by a proper writing duly executed, covenanted to allow her ſo much every year for her maintenance, and that ſhe might live ſeparately from him; to which ſhe agreed. They accordingly lived apart for ſome time. The huſband, during this ſeparation, pretending a deſire to be reconciled to his wife, but in fact only wanting more money of her, ſhe refuſed; whereupon he, with another perſon who aſſiſted him, forced her into a coach as ſhe was coming from church on a *Sunday*, and carried her into THE MINT, and kept her in cuſtody under a ſtrict confinement.

S. C. Stra. 478. Chan. Prec. 496. pl 309. Gilb. Rep. 152. Bur. Rep. 542. S. P. accord. 1. Term Rep. 5.

And now ſhe being brought into court by *habeas corpus*, her huſband moved by his Counſel, that the Court would not interpoſe between huſband and wife; that ſhe could not deny herſelf to be his wife; and that by law the huſband has a coercive power over the wife.

THE COURT. An agreement between huſband and wife to live ſeparate, and that ſhe ſhall have a ſeparate maintenance, ſhall bind them both until they both agree to cohabit again (*a*); and if the wife be willing to return to her huſband, no Court will interpoſe or obſtruct her. But as to the coercive power which the huſband has over his wife, it is not a power to confine her; for by THE LAW OF ENGLAND ſhe is intitled to all reaſonable liberty, if her

(*a*) See Corbet v. Polnitz, 1. Term Rep. 5.

behaviour

Mr. Lister's Case.

behaviour is not very bad; and therefore ſhe ſhall now be ſet at liberty, if it is her pleaſure ſo to be.

She anſwered, that ſhe deſired to be at liberty.

And thereupon ſhe was diſcharged out of the cuſtody of her huſband, and went out of court with her ſon.

But THE COURT ſaid, that the huſband ſhould have leave to write to her, and to uſe any lawful means in order to a reconciliation, provided ſhe was willing to ſee him; and that her children or ſervants ſhould not hinder him, unleſs by her order; but that whenever ſhe permitted him to come to her, he ſhould not offer any violence or uncivil behaviour to her perſon *(a)*.

(a) Rex v. Mary Mead, 1. Burr. 542. in point.—See alſo Guth v. Guth, 3. Bro. Chan. Caſes, 614.

*[23]

Caſe 12.

* Smith *againſt* Trigg.

Tueſday, 28 *November* 1721.

If a mother deviſe a copyhold eſtate in fee to her daughter and heirs, but die without ſurrendering it to the uſe of her will, yet the daughter ſhall take the eſtate by deſcent.

S. C. 1. Stra. 487. 489.

THIS was a caſe referred out of the court of chancery for the opinion of this court.

The point was, Whether one *Jane Day* took the lands in queſtion, either by purchaſe or by deſcent.

The caſe made for the opinion of the Court on a trial at *niſi prius* before PARKER, *Chief Juſtice*, was thus:

Hugh Hunt being ſeiſed in fee of the premiſes in queſtion married *Jane*, the widow and relict of *John Trigg*, the leſſor of the plaintiff's great uncle. After the marriage, *Hugh Hunt* ſurrendered the premiſes to the uſe of his will, and deviſed the ſame to *Jane* his wife and her heirs, and died without iſſue by her. After the death of *Hugh Hunt*, *Jane* was admitted, and likewiſe ſurrendered to the uſe of her will, and deviſed the ſame to *Jane Day*, her daughter and heir by her firſt huſband *John Trigg*, and to her heirs for ever, and ſoon after died. *Jane Day* before admittance made her will, and thereby gave the premiſes to the defendant in the words following: "ITEM, I give and bequeath all my freehold and alſo all my copyhold eſtate, which I intend to ſurrender to the uſe of this my will, lying in *Edmonton*, in the county of *Middleſex*, to my couſin *Thomas Trigg* (the defendant) for and during the term of his natural life, with remainder over." After making the will, and before any court day, *Jane* the deviſor died, having never ſurrendered to the uſe of her will. But the defendant, who was the deviſee, was notwithſtanding admitted under the deviſe.

And IT WAS RESOLVED, that *Jane* was in by *deſcent*, becauſe ſhe was heir at law to the teſtatrix; and that where two rights meet together in one perſon (as they did in this caſe), the one being by *deviſe*, and the other by *deſcent* as heir at law, the deſcent is the moſt noble means to come to an eſtate, and therefore the law

a judges,

adjudges, that the beſt title ſhall ſtand. So where *a feoffment* is made to ſeveral uſes, the reverſion in fee to the heirs of the feoffor, in ſuch caſe the heir ſhall take the reverſion by deſcent, becauſe it was part of the old eſtate of the feoffor; for ſo much of the uſe of the lands which he did not diſpoſe of by the feoffment ſtill remained in him as part of the old eſtate (*a*). But in the caſe of *a will*, if a man deviſe any other eſtate to the heir at law than what he was to take by deſcent; as for inſtance, if the teſtator deviſe a leſs eſtate to him, or an eſtate in fee to ariſe upon a condition, there it is otherwiſe.

SMITH *againſt* TRIGG.

(*a*) Co. Lit. 22. b. 23. a.

HILARY

HILARY TERM,

The Eighth of George the Firſt,

IN

The King's Bench.

Sir John Pratt, *Knt. Chief Juſtice.*

Sir Littleton Powis, *Knt.*
Sir Robert Eyre, *Knt.*
Sir John Forteſcue Aland, *Knt.* } *Juſtices.*

Sir Robert Raymond, *Knt. Attorney General.*

Sir Philip Yorke, *Knt. Solicitor General.*

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* Button *againſt* Heyward and his Wife.

Caſe 13.

THE PLAINTIFF brought an action on the caſe againſt the defendants for ſlanderous words ſpoken by the wife, VIZ. "*George Button*" (the plaintiff) "is the man who killed "my huſband," her firſt huſband being dead; and a verdict was given for the plaintiff.

To ſay of a certain perſon, "that is the man "who *killed* my "huſband," is actionable.

1. Viner, 507. 2. Bar. K. B. 84. 1. Roll. Abr. 71, 72. 1. Vent. 117. Cro. Eliz. 823. 1. And. 120. 2. Stra. 1130. Cowp. 276.

IT WAS MOVED *in arreſt of judgment*,

FIRST, That theſe words are not actionable, for the uncertainty of the word "killing;" for it might be juſtifiable, or in his own defence, or *per infortunium*, and ſhall not be preſumed felonious, and ſo made actionable by intendment; for it is a maxim, that words ſhall be taken *in mitiori ſenſu* (*a*).

SECONDLY, The "*adtunc defunct*" in the declaration refers to the time of the declaration, not to the time of ſpeaking the words (*b*).

(*a*) Moor, 573. Cro. Jac. 215. 306. 331. Hob. 6. 77. 177. Cro. Jac. 315. 4 Co. 20. Roll. Abr. 72. 77. 2. Salk. 634. 696.

(*b*) Hob. 6. Cro. Jac. 331.

THIRDLY,

BUTTON *againſt* HEYWARD AND HIS WIFE.

THIRDLY, The words in the laſt count, "I know the man "that killed my huſband, it was *George Button*," are ſpoke of a paſt time, perhaps ſeveral years ago; and ſo not actionable (*a*).

WYNDHAM *contra*.

FIRST, The words in themſelves import a voluntary and unlawful killing by neceſſary inference; and in the later reports have always been held actionable (*b*).

SECONDLY, There is no neceſſity to aver the death of her huſband, for the words imply it (*c*).

PRATT, *Chief Juſtice*. There can be no queſtion but, at this day, theſe words are actionable. In former times words were conſtrued *in mitiori ſenſu* to avoid vexatious actions, which were then very frequent; but now *diſtinguenda ſunt tempora*, and we ought to expound words according to their general ſignifications to prevent ſcandals, which are at preſent too frequent. The words themſelves aſcertain the death of the perſon (*d*); and therefore there can be no neceſſity for any averment. We are to underſtand words in the ſame ſenſe as the hearers underſtood them; but when words ſtand indifferent, and are equally liable to two diſtinct interpretations, we ought to conſtrue them *in mitiori ſenſu*; but we will never make any expoſition againſt the plain natural import of the words: the word "killing" ſignifies a voluntary and unlawful killing, and is actionable. There are a great many very odd caſes in the Books.

POWYS, *Juſtice*, was of the ſame opinion.

EYRE, *Juſtice*. The words are to be taken in their worſt ſenſe, for a malicious and felonious killing. The word "killing" of late years has been held actionable.

EYRE, *Juſtice*. AS TO THE SECOND QUESTION, whether any averment of the huſband's death is neceſſary; the defendant's words have aſcertained the death. In the time of king *James the Firſt* this exception prevailed, but never of late (*e*). In the caſe of *Jacob v. Miles* (*f*), "*adtunc defunct*" was held inſufficient, becauſe it referred to the time of declaration; but that point has been often over-ruled. In that caſe it was alſo reſolved, that where the jury gave ſeveral damages for the words ſpoken at ſeveral times, and the judgment was entire for the damages and coſts, the Court might reverſe the judgment *quoad* the damages given for the words not

(*a*) Roll. Abr. 48. Vent. 50. W. Jones, 48. and the caſe of Wills *v.* Wills, Trinity Term the 7. *Geo.* 1.—See alſo Carſlake *v.* Mappledoram, that charging a perſon with *having had* a contagious diſtemper is not actionable, becauſe it refers to a time paſt. 2. Term Rep. 473.

(*b*) Cro. Eliz. 49. 823. Cro. Jac. 166. Lev. 277. 4. Co. 15. 2. Lev. 150. Salk. 695. 697.

(*c*) Cro. Eliz. 317. Cro. Car. 489.

(*d*) See Peake *v.* Oldham, Cowp. 276.

(*e*) Sid. 52.

(*f*) Cro. Jac. 343.

actionable,

actionable, and affirm it for the reſt, and all the coſts; which reſolution has ſince been denied for law, for that the judgment muſt be reverſed or affirmed *in toto*: ſo the caſe is of no great authority in any reſpect.

BUTTON *againſt* HEYWARD AND HIS WIFE.

FORTESCUE, *Juſtice*. The rule of conſtruction in actions for words is very different from what it formerly uſed to be. The maxim for expounding words *in mitiori ſenſu* has for a great while been exploded, near fifty or ſixty years (*a*); whenever words are diſreputable they are actionable. It was the rule of HOLT, *Chief Juſtice*, to make words actionable whenever they ſound to the diſreputation of the perſon of whom they were ſpoken; and this was alſo HALE'S and TWISDEN'S rule; and I think it a very good rule. If the killing was juſtifiable, why did not the defendant juſtify the ſpeaking the words? In the caſe of *Baker v. Pearce* (*b*) it was held, that words are to be taken *in malam partem*.

SECONDLY, An averment is not neceſſary (*c*). The Court will intend the party dead, unleſs it appears upon the record that he was alive.

BY THE COURT, Judgment for the plaintiff.

(*a*) Skin. 364. Forteſ 207. 10. Mod. 197. Gilbert Caſes, 117. 286. 1. Vin. Abr. 500. pl. 1. 507. pl. 40.
(*b*) 2. Salk. 695. 2. Ld. Ray. 959. 6. Mod. 23.
(*c*) Vent. 117.

* Spiller and his Wife *againſt* Adams. Caſe 14.

THE PLAINTIFF brought a *writ of dower* againſt the defendant, who was then *an infant*, and admitted *ad proſequendum* by his *next friend*, and pleaded *uncore priſt*; and judgment being given for the plaintiff in the common pleas, *Adams* brought a writ of error in the court of king's bench, and aſſigned the matters following for error.

In dower againſt an infant, an admiſſion to *proſecute* by his *next friend* is good, although he is *defendant*.

FIRST, That the admittance *ad proſequendum* by *prochein amy* was wrong, for it ſhould be *ad defendendum per guardianum*.

Palm. 295. 1 Rell. Rep. 257. Cro. Jac. 640. Cro. Car. 86. 3. Bac. Abr. 149.

To which it was anſwered, and ſo RESOLVED BY THE COURT, that true it is, an infant often proſecutes by his *next friend*; but yet an admittance *ad proſequendum* is good, even where he is defendant; for it is to proſecute his plea by which he defends himſelf againſt the plaintiff.

SECONDLY, It was objected, that damages were given to the defendant, which ought not to be done, becauſe he pleaded *uncore priſt*, which is no plea in dower, unleſs an actual aſſignment was made.

In dower, *encore priſt* is good, if damages be given.

To which it was anſwered, AND SO RULED, that damages in this caſe were well given, though the defendant had pleaded *uncore priſt*, becauſe damages may be given *occaſione detentionis dotis*.

Co. Lit. 32. Lutw. 717. 5. Com. Dig. "Pleader" (2. Y. 4.).

THIRDLY,

In dower, there ſhall be judgment to *recover the value*, and damages.

10. Rep. 117. Raſt. Ent. 399. Cro. Jac. 140. Salk. 108. 5. Com. Dig. "Pleader" (2. Y. 19.). See 1. Inſt. 37. Dyer, 378. Brownl. 217. 2. Cro. 640. Sid. 446. 1. Vent. 73. Lutw. 719. 2. Saund. 94.

THIRDLY, It was objected, that though damages might be given in this caſe, yet it ought not to be upon the judgment *quod recuperet dotem*, this being in a real action; for before the *ſtatute of Glouceſter* (*a*) no damages were allowed in a real action; therefore the damages ought to be given from the time of the *diſſeiſin* until after the writ of enquiry returned by the ſheriff, if there was no wilful delay by the demandant.

To which it was anſwered, AND SO RESOLVED, that by the *ſtatute of Merton* (*b*) the widow in a writ of dower ſhall recover the value of her dower in damages from the death of her huſband to the day that ſhe recovers the dower itſelf; that is, "*uſque diem "quâ ipſa recuperaverit per judicium Curiæ ſeiſinam ſuam*," which, by intendment of law, is the day on which ſhe had judgment *quod recuperet dotem*, for from that day ſhe is accounted in the poſſeſſion or ſeiſin of her dower.

So the judgment was affirmed.

(*a*) 6. *Edw.* 1. c. 1. (*b*) 20. *Hen.* 3. c. 1.

* [26]

Caſe 15.

* Read *againſt* Marſhall.

Treſpaſs on two counts on different days for taking a huſband's goods, and beating his wife, is good, though entire damages are given.

S. C. poſt. 342. S. C. Fortſ. 377.

TRESPASS on two counts. The firſt was, for breaking the plaintiff's houſe, and taking his goods. The ſecond was laid on a different day for beating his wife, *et adtunc et ibidem bona et catalla ipſius querentes cepit et aſportavit*. Judgment by default; and on writ of enquiry entire damages were given.

BELFIELD, *Serjeant*, moved in arreſt of judgment, Becauſe no damages ought to have been recovered for beating the wife, ſince ſhe is no party to the action, nor has the plaintiff laid any ſpecial damage, as *per quod conſortium amiſit*, &c. to entitle him ſolely to this action. If theſe damages ſhould be recovered, there may be two recoveries for one aſſault, for this action would be no bar to any action to be brought by the huſband and wife jointly.

GAPPER *contra*. The aſſault of the wife is only laid as aggravation of the damages, and not as a diſtinct treſpaſs (*a*).

THE COURT inclined to think that this declaration was good. But *adviſare vult* (*b*).

(*a*) See Ruſſell and his Wife *v.* Corne, 1. Salk. 119. 2. Salk. 640. S. C. 6. Mod. 127. S. C. 2. Lord Ray. 1031. Tod and his Wife *v.* Redford, 11. Mod. 264. James Oſborne's Caſe, 10. Co. 130. Tomlins *v.* Hoe and his Wife, Cro. Jac. 664. Dix *v.* Brooks, 1. Stra. 61. S. C. Fort. 378.

(*b*) It is ſaid, S. C. Fort. 377. that the Court held the declaration good, although the wife was not joined.

The

The King *againſt* The Marquis of Powis (*a*). Caſe 16.

UPON A WRIT OF ERROR to reverſe an outlawry for HIGH TREASON,

In outlawry for high treaſon, if the *capias* be to another county than that in which the defendant is deſcribed to live, it is an error in fact.

The error aſſigned was, that the proceſs of outlawry againſt *the marquis* was directed to the ſheriff of *London*, when he, *the marquis*, lived in the pariſh of *St. Giles*, in the county of *Middleſex*, which is an error in fact; for the proceſs of *capias* muſt be always directed to the ſheriff of the county where the party lives.

And for this reaſon the outlawry was reverſed, upon the confeſſion of THE ATTORNEY GENERAL.

S. P. C. 68. 2. Hale, 196. 4. Hawk. P. C. ch. 27. ſ. 116 to 128.

N. B. There were ſeveral exceptions in point of law taken to the record in this Term.

(*a*) This caſe came before the Court on Wedneſday, the 11 April, 1722; but it was firſt argued in Hilary Term, in the ſeventh year of *George the Firſt*, and finally determined in Michaelmas Term, in the ninth year of *George the Firſt*.—NOTE *to the former edition.*

* The King *againſt* The Dean and Chapter of Trinity-Chapel, in Dublin. Caſe 17.

THE DEAN AND CHAPTER of *Trinity-Chapel*, in *Dublin*, denying *Dr. T. S.* the archdeacon of, &c. his ſeat therein, and his voice in the chapter, he brought a *mandamus* in the court of king's bench in *Ireland*, directed to them, ſuggeſting, that his predeceſſors, time out of mind, had enjoyed the ſaid liberty, and that the franchiſes and liberties of their corporate body were confirmed by letters patent of *Henry the Eighth*, &c.

A dean and chapter who have power to make bye-laws cannot make a bye-law that an archdeacon ſhall take the oath of canonical obedience before he is admitted into his office.

2. Roll. Rep. 499. 6. Com. Dig. "Serement" (B.).

THE DEAN AND CHAPTER made a return to the effect following, *viz.* That by the ſame letters patent they had power to make bye-laws for the benefit of their corporate body; and that they made a bye-law on ſuch a day, &c. that no perſon ſhould be admitted a member of their body, unleſs he had taken the oaths of canonical obedience, and to keep the ſecrets of the ſaid chapter, which *the archdeacon* denied to take; and thereupon they refuſed to admit him.

This return was adjudged inſufficient in the court of king's bench in *Ireland*; whereupon they granted *a peremptory mandamus*, and then *the dean and chapter* brought a writ of error in the king's bench here.

IT WAS ARGUED in their behalf, that the cauſe of denial, as returned by them, was a good and ſufficient cauſe; and that a *mandamus* was not the proper remedy for *the archdeacon* in this caſe.

THE KING *againſt* THE DEAN AND CHAPTER OF TRINITY-CHAPEL, IN DUBLIN.

* [28]

THE COURT as to THE FIRST POINT adjudged, that the dean and chapter had not returned a ſufficient cauſe, but that they had uſurped a juriſdiction, by tendering or requiring *an oath* to be taken (*a*), which could not be done but by a court of judicature, or by ſome ſpecial words in the letters patent, giving them authority ſo to do, which authority could not be implied by any general words, expreſſing their power to make bye-laws.

A writ of error will not lie upon the award of a peremptory mandamus,

But THE CHIEF POINT was, whether a *writ of error* would lie upon a *peremptory mandamus*.

S. C. Stra. 536. Poph. 176. Mod. Rep. 81. 281. Lev. 291. 1. Stra. 625. 5. Com. Dig. "Pleader" (3. B. 7.).

And IT WAS ARGUED againſt the dean and chapter, that a *mandamus* would not lie, becauſe it was a prerogative writ, upon which the particular right of the ſubject was never yet determined; for it is grantable by the Court only in caſes of * a public nature for ſettling the poſſeſſions of men, and not between any parties in intereſt, and therefore no reſtitution can be granted upon this writ. It is no more than a command to a perſon to do his duty, as to admit another to an office, or to ſome freedom, or to ſome place or freedom which belongs to him to whom it is granted, and for which he has no remedy by any other action. Now in the principal caſe, as to a place in the chapel and voice in the chapter,

Lev. 291.

it is no more than *a franchiſe* belonging to the office of archdeacon, for which no *aſſiſe*, *ejectment*, or *quare impedit*, will lie; and though he might maintain an *action of treſpaſs* on the caſe for it, yet that is no remedy, becauſe in ſuch caſes damages are only to be

Roll. Abr. 481. Lev. 119. Vent. 188. W. Jo. 199.

recovered, and not the franchiſe itſelf. It is true, that a *mandamus* will lie to reſtore a man to his priority of freedom. It may be directed to a biſhop to induct a man into his prebendary, and to give oil to a prieſt in baptiſm; but ſuch writs, and others of the like nature, ſhall never be controlled by *writs of error*; for if they ſhould, many inconveniencies would follow, becauſe it is uſual to grant a *mandamus* to pariſh-officers, and to magiſtrates, to deliver the enſigns of their temporal offices, or to command them to do their duty in their reſpective offices; and if writs of error would lie on ſuch commands, it would admit of unſufferable delays. A writ of error was never yet granted where a fine was impoſed, or on a commitment for a contempt, or upon the award of any writ by any court of juſtice, in which caſes the properties and liberties of the ſubject are concerned (*b*). And if it be not grantable in a criminal action, where a man is deprived of his liberty, there can be no reaſon why it ſhould be granted in a civil action, as in this caſe. It is true, this matter was conteſted in the caſe of the *Conſtables of Ayleſbury*, VIZ. whether a writ of error would lie upon the return of a *habeas corpus*, but it was not determined. It is likewiſe true, that by a late ſtatute *a traverſe* is given to the return of a *mandamus*, as if it had been an action on the caſe; but

(*a*) 6. Com. Dig. "Sermens" (B.). (*b*) Hardres, 401.

yet

yet that does not make it an action on the case (*a*). It is objected, that a writ of error might lie without delaying the party, for it might not be a *superſedeas* (*b*). But the form of entering the award of a *peremptory mandamus* is an argument that no writ of error lies; for they are never entered "*Ideo conſideratum eſt* (*c*)." When the Court denies a *peremptory mandamus*, there is no pretence that any *writ of error* will lie, ſo that the conſequence will be, that *a writ of error* lies only of one ſide.

ON THE OTHER SIDE *it was argued*, that though in this caſe a writ of error would not lie upon the firſt *mandamus*, becauſe it was in the nature of an *interlocutory judgment*, * and no more, yet it muſt lie upon this *peremptory mandamus*; for though it was formerly but a letter from THE KING, yet now it has obtained the ſanction of an *original writ*; and like ſuch writ, if it bear *teſte* out of Term it is void. The reaſon of the law ſeems to be plain, that a writ of error will lie upon a *peremptory mandamus*, for it will lie upon any judgment by which the defendant conceives himſelf to be aggrieved or damnified, unleſs he has another proper remedy for relief; but *the dean and chapter* in this caſe have no remedy but by a writ of error; for if their return to the firſt *mandamus* was good, and ruled to be otherwiſe, they are pinned down by ſuch judgment; and though they are wronged by it, they have no remedy.

* [29]

Lev. 91. Vent. 205. 212. 266. Sid. 44. Mod. 258.

THE COURT was of opinion, that the right of any perſon was not to be determined upon a *mandamus*. It gives a remedy where there is a ſeeming probability for it, and it ſettles people in their poſſeſſions, ſo that they may be able to defend their right, or, by virtue thereof, to bring any action for things incident to the poſſeſſion; and if *a writ of error* ſhould lie in ſuch caſes, it would entangle all the public acts of annual officers in moſt corporations and pariſhes. It is againſt the nature of *a writ of error* to lie on any judgment, but in cauſes where an iſſue may be joined and tried, or where judgment may be had upon a demurrer, and joinder in demurrer, and therefore it will not lie on a judgment for a *procedendo*, nor on the return of an *habeas corpus*. It is true, if the defendant in error had traverſed the return of *the dean and chapter* to this *mandamus*, as by the ſtatute 9. *Anne*, c. 20. he might, in ſuch caſe the writ of error would have been good, becauſe then a final judgment might be given; for upon the traverſe of the facts in the return, the other ſide may take iſſue or demur; and ſuch proceedings might be had, as if the proſecutor of the *mandamus* had brought an action on the caſe for *a falſe return*; and if he had a verdict or judgment on a demurrer, he ſhall recover his damages and coſts, upon which judgment a *writ of error* would lie; but it was never yet determined that it would lie upon *a peremptory mandamus*.

(*a*) By 9. *Anne*, c. 20.

(*b*) Every writ of error is a *ſuperſedeas*, 1. Sid. 45. Cro. Jac. 342. Stund *v.* Palmer, Trinity Term, 2. *Geo.* 1.

(*c*) The caſe of the Corporation of Maidſtone, 16. *Car.* 2. Roll 35.

THE KING *againſt* THE DEAN AND CHAPTER OF TRINITY-CHAPEL, IN DUBLIN.

Forteſc. Rep. 329.

And therefore IT WAS RESOLVED by THE WHOLE COURT, that it would not lie.

A WRIT OF ERROR was afterwards brought on this judgment in the houſe of peers; and THE LORD CHIEF BARON, who attended there, together with ſeven other Judges, acquainted the lords in parliament, that ALL THE JUDGES OF ENGLAND were of opinion, that *a writ of error* would not lie.

* [30] * And thereupon the judgment of the court of king's bench was affirmed (*a*).

(*a*) On 21 April, 1724. 10. *Geo.* 1.

Caſe 18.

Muck's Caſe.

A declaration in ſlander for ſaying, "*A* ſtole "a ſheep of "*his*," INNUENDO a ſheep of *the defendant*, is good.

1. Roll. Abr. 82.
Hob. 2.
3. Lev. 68. 166.
1. Salk. 513.
Cro. Car. 92.
Palm. 358.
2. Wilſ. 114.

AN ACTION ON THE CASE was brought againſt *Muck* for ſlanderous words, VIZ. "*Muck* ſtole a ſheep of his" (*innuendo* of the defendant), "and it was not the firſt he ſtole by "a hundred." Upon not guilty pleaded the plaintiff had a verdict.

The defendant moved in arreſt of judgment, that the words were not actionable; for "*Muck* ſtole a ſheep of his" muſt be intended *Muck*'s own ſheep, for the particle *his* muſt refer *ad proximum antecedens*, which is *Muck*, ſo that theſe words are repugnant; for a man cannot ſteal his own ſheep; like the caſe in *Roll. Abr.* 74. where an action was brought againſt huſband and wife for words ſpoken by the wife, *viz.* that "the plaintiff ſtole ſome of her "goods:" and it was adjudged not actionable, becauſe a married woman cannot have any goods, for they are the goods of the huſband.

But in the principal caſe THE COURT over-ruled the objection, and held the words actionable as laid in this declaration.

Caſe 19.

Carvell, &c. *againſt* Manly.

In treſpaſs and falſe impriſonment for ſeven months; a juſtification under a *capias utlagatum*, alledging it to be *the ſame treſpaſs*, and TRAVERSING that he was guilty before the delivery, or after the return, of the writ, is bad on a *ſpecial demurrer*.

ACTION OF ASSAULT AND FALSE IMPRISONMENT for ſeven months from the firſt of *October*. The defendant juſtified for the whole time by virtue of a writ of *capias utlagatum*, *quæ eſt eadem tranſgreſſio, captio, impriſonamentum, et detentio*, &c. and then traverſed, *abſque hoc*, that he is guilty at any time after the return of the writ.

The defendant who ſued out the writ juſtified under it; and upon a ſpecial demurrer to his plea the plaintiff had judgment in the common pleas, becauſe the juſtification was under a writ taken out at ſuch a time, and the defendant did not conclude his plea with *prout patet per recordam*, nor traverſe that he did impriſon the plaintiff at any other time.

S. C. Prac. Reg. 271. S. C. Fort. 379. Stra. 694. Lutw. 1457. Cro. Eliz. 504. 1. Wilſ. 81. 219. 2. Bl. Rep. 776.

And

And now upon a writ of error in the court of king's bench upon that judgment, the error aſſigned was, the want of a *good original.* CARVELL, &c. *againſt* MANLY.

It is true, there was an original, but it was not returned, and therefore it is void.

The general errors were aſſigned: and alſo, that no bill was filed, but upon alledging *diminution* a bill was returned filed of another Term; but no return to that bill was certified.

TO WHICH *it was anſwered,*

FIRST, That there are two ſorts of returns, one made on the roll, and the other by the ſheriff. Now though there was no return made by the ſheriff on this original, yet there being one filed on the roll, and certified from thence as returned, that is ſufficient to make it a good original.

And as to the objection againſt the plea, *viz.* that the defendant had juſtified under a writ, and did not conclude, * *prout patet per recordum*; and that he had not traverſed the impriſonment at any other time than upon the writ ſued out at ſuch a time; * [31]

IT WAS ARGUED, that if the action had been brought againſt the ſheriff, and he had juſtified under the writ, he muſt have concluded his plea with *prout patet per recordum*, becauſe it would not have been a record if he had not returned the writ; but though he never returned it, it is ſtill a good juſtification for the defendant in this action. But it is not abſolutely neceſſary for a defendant to conclude his plea with *prout patet per recordum*, becauſe a writ may be loſt.

And as to the other objection, that the defendant did not traverſe the impriſonment at any other time, &c. that is only ſurpluſage; for if the juſtification is good, the traverſe would be wholly immaterial. Lev. 211. 3. Lev. 227. Lut. 1452.

THE COURT. The *original* gives juriſdiction to this court, and by conſequence if that is not returned, the Court has no juriſdiction in this caſe; and the cauſe cannot properly be ſaid to be in court; but if the ſheriff never returned the writ, how could the defendant in this action plead *prout patet per recordum?* therefore his plea muſt be good without ſuch concluſion; and if his plea is good, then the traverſe will be immaterial.

So the judgment in the common pleas was affirmed.

Glynn *againſt* Yates. Caſe 20.

THE CASE was thus: The principal died, not having ſurrendered himſelf before the return of the ſecond *ſcire facias.* The bail are liable, if the principal die between the return of the *ca. ſa.* and the ſecond *ſcire facias.*—S. C. 1. Stra. 511. Poſt. 340. 1. Stra. 198. 2. Stra. 717. 2. Ld. Ray. 1452. 2. Wilſ. 67. 1. Burr. 244. 436. 1. Bl. Rep. 393. 811. 3. Burr. 1360. Tidd's Pract. 145, 146.

GLYNN *againſt* YATES.

Upon a motion the queſtion was, Whether the bail are liable to the debt?

IT WAS ARGUED *againſt the bail*, that they are liable; for in ſtrictneſs of law, upon a *capias* awarded and filed againſt the principal, and *non eſt inventus* returned, the bail afterwards are liable. It is true, by the favour of the Court they have time to render the principal until the return of the ſecond *ſcire facias* againſt them (*a*); and therefore that matter ought to be pleaded to the *ſcire facias*, and not to be allowed upon a motion; but it cannot be pleaded, becauſe it is not law.

TO WHICH *it was anſwered*, that if it is not law, and therefore not to be pleaded, it is the greater reaſon that it ſhould be determined upon a motion; for the death of the * principal being the act of God, it ſhall never be prejudicial to the living; and the plaintiff has no damage by the death of the principal, becauſe he might have died if he had been in gaol; but it would be a great damage to the bail, if they ſhould not be diſcharged by his death.

* [32]

PRATT, *Chief Juſtice*. The bail are bound by their recognizance to render the principal where judgment is had againſt him, or to pay the condemnation-money; but by the courſe of the Court the principal has time to render himſelf in diſcharge of the bail until the ſecond *ſcire facias* againſt them is returned; and here the act of God intervened, *viz.* the principal died, ſo that he could not render himſelf within that time.

EYRE, *Juſtice*. It is true, the grace of the Court is uſually extended to the bail, where the principal ſurrenders himſelf, but never where he does not. This was the courſe of the Court when POPHAM was *Chief Juſtice*, but it was altered by my LORD COKE, and altered again in *Croke*'s time (*b*); That if the principal ſurrendered himſelf before the return of the ſecond *ſcire facias* againſt the bail, they ſhould be diſcharged; but the indulgence of the Court never extended farther (*c*). It is wrong to ſay, that the plaintiff has no damage by the death of the principal, dying before the time he had to ſurrender himſelf; for it is ſeen by daily experience, that men will pay their debts rather than be committed: and ſo might the principal in this caſe rather than to be rendered in cuſtody. Beſides, *the plaintiff* is a ſtranger to the bail, and there is no truſt or privity between him and them, but there is a great truſt between *the principal* and *the bail*; ſo that it ſeems very reaſonable they ſhould ſuffer in this caſe rather than the plaintiff, who is an innocent perſon; for it is probable they may have counter-ſecurity from the principal to indemnify them; and therefore it is more proper for them than for the plaintiff to ſue his executor or adminiſtrator upon ſuch counter-ſecurity; for it is to be preſumed, that by reaſon of that truſt which is between them, they may

(*a*) Mcor, 775. Cro. Jac. 97. 165. Buiſt. 331. W. Jones, 138. Hob. 210. T. Raym. 14. 6. Mod. 238.

(*b*) Cro. Eliz. 738.

(*c*) 1. Salk. 101.

know

know more of his concerns than it is poſſible for the plaintiff to know.

GLYNN *againſt* YATES.

So, on the laſt day of the Term, judgment was given for the plaintiff againſt the bail.

* [33]

* Atkinſon, Executrix of Atkinſon, *againſt* Coatſworth.

Caſe 21.

UPON A WRIT OF ERROR on a judgment in an action of covenant the caſe was:

If an under-leſſee covenant to perform all the covenants in the original leaſe, and an action for breach of covenant be brought by his leſſor, declaring, "*that* "*by an indenture* "*made between* "*the parties a-* "*foreſaid, it was* "*covenanted,* "*&c.*" theſe words imply, that the original leaſe was executed by the plaintiff, and, if they did not, the defendant is *eſtopped*, by having executed the *under leaſe*, in which the *original leaſe* is recited, from ſaying, that there is no ſuch leaſe or covenants.

S. C. 3. Danv. 266. S C. 1. Stra. 512. Ld. Ray. 1377.

One *Snell*, by indenture of leaſe, demiſed lands to *Atkinſon* the teſtator for a certain term of years, rendering rent, and performing other covenants therein-mentioned. *Atkinſon* afterwards made an under-leaſe of the premiſes to the defendant *Coatſworth*, who therein covenanted with *Atkinſon* "to perform and keep all the "covenants in the original leaſe to be kept and performed by the "ſaid *Atkinſon*, his executors, &c. or aſſigns." *Atkinſon* having made his wife, the now plaintiff, executrix, died. The rent reſerved on the original leaſe not being paid, ſhe brought an action of covenant againſt *Coatſworth*, and aſſigned for breach the non-payment of the rent, &c.

Upon the general iſſue pleaded, the cauſe was tried at the aſſiſes in *Durham*, and the plaintiff had a verdict and judgment.

Upon a writ of error brought by the defendant, the error aſſigned was, that the plaintiff in her declaration had not ſet forth that *Atkinſon* her teſtator executed the original leaſe on his part, for if it was not ſigned and ſealed by him, then it was not his deed. It is true, that being executed by *Snell*, it had all the eſſential qualities of a deed; but it does not follow from thence that it was the deed of the teſtator, and by conſequence the defendant ſhall not be bound by a covenant relative to ſuch deed. If it ſhould be objected, that the defendant in this caſe is *eſtopped* by his own deed (made between him and *Atkinſon*) to ſay that the original deed is not the deed of *Atkinſon*, becauſe that very original deed is recited in his own deed; the anſwer is, that this general eſtoppel does not bar him from ſaying, that by the firſt leaſe there is no rent reſerved, or to be paid by *Atkinſon*; for the defendant is to perform no more than thoſe covenants which were to be performed by *Atkinſon*, and the plaintiff muſt ſhew what thoſe covenants are before ſhe can be entitled to this action.

ON THE OTHER SIDE *it was argued* for her, that by her declaration ſhe has ſet forth, "that *per indenturam factam inter* "*partes prædict. Atkinſon* did covenant, &c." Now theſe words imply, that the indenture was executed by him on his part; and therefore ſhe need not ſet forth all the circumſtances of * ſigning, * [34]
ſealing, and delivering, becauſe her alledging that it was made *inter partes prædictas* implies all the reſt. So where the plaintiff declared, that the teſtator *deviſavit*, or that the feoffor *feoffavit*, &c. Lutw. 333.

ATKINSON, EXECUTRIX OF ATKINSON, *againſt* COATSWORTH.

theſe words imply all other requiſites either to a will or a feoffment; and if ſo, then *facta* in this caſe implies all requiſites to the making an indenture, and *convenit* all requiſites to the making a covenant. Beſides, the original indenture being recited in the other, in which the defendant covenanted "to perform all the "covenants therein, which on *Atkinſon*'s part were to be paid, "done, or performed," he is now barred to ſay there are no ſuch covenants in the original leaſe, becauſe he has allowed it to be an indenture, and with ſuch covenants.

THE COURT. The ſubſtance of the objection is, that the plaintiff has not ſet forth in her declaration, that the original indenture was ſigned and ſealed by *Atkinſon* on his part, or that it was his deed; for if it was not, then the defendant is not bound to perform the covenants therein contained; but the plaintiff has alledged, that it was an indenture *facta inter partes prædictas*, which implies that both *Snell* the original leſſor, and *Atkinſon* likewiſe, ſigned the deed, and ſo it became the deed of both parties; for where an indenture is made between two parties, that muſt be implied; and the other circumſtances of ſealing and delivering it as his deed need not be ſet forth. As to the *eſtoppel*, it is very full againſt the defendant, for he has covenanted in the ſecond leaſe "to perform all the covenants in the original leaſe which on "*Atkinſon*'s part were to be paid, done, or performed;" by which he is now *eſtopped* to ſay, that there are no ſuch covenants in the original leaſe.

Moor, 23. Poph. 115. Roll. Abr. 872.

*[35] So the judgment was affirmed.

Caſe 22. The King *againſt* The Mayor and Common-Council of Bedford.

If the cuſtom of a corporation be to elect thirteen common-council-men out of twenty-five *burgeſſes*, and that the mayor ſhall be choſen by the majority of the thirteen, and a man who is only a *freeman*, and not a *burgeſs*, be one of the twenty-five, and be choſen a common-council-man, ſuch election is void, and the corporation may proceed to a new election of common-council-men.

A RULE OF COURT was made againſt the mayor and common-council-men of *Bedford*, to ſhew cauſe why AN INFORMATION ſhould not be filed againſt them for an undue election of a burgeſs of the ſaid borough.

THE CASE appeared to be thus: * The town of *Bedford* is a borough by preſcription; and time out of mind, on the *Monday* next after *Bartholomew-Day* had put up twenty-ſix burgeſſes, in nomination, out of which they choſe thirteen common-council-men, who, when choſen, had votes in electing a mayor and other officers in the ſaid borough. At the laſt election, on *Monday* after *Bartholomew-Day*, they put one *Benſon* in nomination, with twenty-five more, who were *burgeſſes*, but *Benſon* was only *a freeman* of the ſaid borough, and not a burgeſs; and he was choſen by the majority of the other twenty-five burgeſſes to be one of the thirteen common-council-men. Afterwards, the mayor finding that *Benſon* was not qualified to be one of the twenty-ſix

burgeſſes,

burgeſſes, for the reaſon before-mentioned, proceeded to a new election, and they choſe one *Devereux* to be a burgeſs in the room of *Benſon*.

THE KING *againſt* THE MAYOR AND COMMON-COUNCIL OF BEDFORD.

And now *Hughes*, who was one of the other twenty-five burgeſſes, and put in nomination as aforeſaid, and who was duly qualified, and had moſt votes to be a common-council-man next to the ſaid *Benſon*, proſecuted AN INFORMATION againſt the mayor and the twelve common-council-men, as not being choſen by twenty-ſix qualified burgeſſes; for that *Benſon*, one of the twenty-ſix, was a freeman and no burgeſs, and therefore the whole election void, as not warranted by the cuſtom of the borough.

THE COUNSEL *for them* inſiſted, that the rule might be diſcharged; for when an election is made by ſeveral perſons, whereof ſome are qualified to chuſe, and ſome not, it is good as to the perſons qualified; for if it ſhould be otherwiſe, and the election wholly void, and that they cannot re-elect, there would be an end of this borough by preſcription, for then they can neither have burgeſſes nor common-council-men, who are to name the bailiffs, and who have votes at the election of a mayor. Therefore to avoid this inconvenience, if one unqualified perſon be choſen, they may elect another who is qualified, as ſoon as they underſtand he is unqualified; and this has been the conſtant courſe in this borough.

THE COUNSEL *for the proſecutor* denied this; for they inſiſted, that where an election is made by one or more perſons unqualified, if it be void as to the perſon elected, yet he who has moſt votes next to the unqualified perſon elected ſhall be deemed duly choſen. It is true, that where perſons apparently unqualified are nominated, or put up for candidates, in ſuch caſe, an election made by or out of ſuch perſons is entirely void, becauſe it is an undue election, and ſhall not ſtand for any part, eſpecially * when, by the cuſtom of the place, ſuch a determinate number of qualified perſons are to chuſe. Now in this caſe, one of the perſons nominated to be a burgeſs being only a freeman, and no burgeſs, and the choice of common-council-men being to be made on a certain day, and by a particular number of burgeſſes, if it be not made on that day, nor by that number, the whole election is void *(a)*, and not as to the unqualified perſon alone; for if he had not been put in nomination as a burgeſs, he might have voted as a freeman, the benefit whereof was by this means loſt, both as to himſelf and his friends. It is true, in ſome caſes the borough might proceed to a new election; as where the perſon choſen did not receive the ſacrament within a year, &c. or where he had not taken the oaths, &c. becauſe theſe are diſabilities which ariſe after the election, and might not be known before; but where the diſability is apparent before the election, as it was in the principal caſe, then it is void from the very beginning.

* [36]

(*a*) But ſee 11. *Geo.* 1. c. 4.

PRATT,

THE KING *againſt* THE MAYOR AND COMMON-COUNCIL OF BEDFORD.

PRATT, *Chief Juſtice*, and two other of the Judges, were of opinion, that what was inſiſted on by this motion for the proſecutor would introduce a great inconveniency; for if this ſhould be adjudged a void election as to the whole, then the borough would be deſtroyed, for there cannot be any other mayor, or any thing done by common-council men. Therefore if ſome unqualified, as *Benſon* was, are put in nomination with thoſe who are qualified, as the other twenty-five were, and the unqualified perſon is choſen, as *Benſon* likewiſe was, it avoids the election as to him only, and not to the other twelve common-council-men who were duly choſen and qualified; and where there is no fraud, but a plain miſtake, the re-election of a qualified perſon ſhall be good.

But THE FOURTH JUSTICE differed in opinion, for it was not clear to him how thirteen common-council-men, who by the cuſtom of the place were to be choſen out of twenty-ſix qualified burgeſſes, could be lawfully choſen out of twenty-five, for they might as well be choſen out of any other number, if once the cuſtom is broken. However, HE WAS OF OPINION, that *Hughes*, who had the moſt votes of the twenty-five burgeſſes duly qualified, next to *Benſon* who was not qualified, was duly choſen; therefore, that the plaintiff complaining ought not to be hindered to try his right upon this information.

* This being upon the firſt motion, and THE COURT being not all of one opinion, the rule was enlarged as to the perſon re-elected, and diſcharged as to the reſt.

* [37]

And afterwards, on another day, and upon another motion to ſet aſide the rule as to the perſon re-elected,

THE QUESTION was, Whether if one who is unqualified be choſen by a majority of thoſe who are qualified, and his election is made void becauſe he is unqualified, a perſon who is qualified, and has the majority of votes next to him who is not qualified, ſhall be adjudged duly choſen, or whether they muſt proceed to a new election?

IT WAS INSISTED that *Hughes*, who was qualified, and who had the moſt votes next to *Benſon*, who was not, but yet was choſen, ſhall be deemed to be a duly elected burgeſs, and the new election of *Devereux* ſhall be void and ſet aſide. It is no excuſe to ſay, that they did not know *Benſon* was not qualified at the time he was choſen burgeſs, becauſe it was in their power to be duly informed of the truth, for they had all the borough-books in their cuſtody; and ignorance can be no excuſe where they had all the means of knowing the truth amongſt themſelves. Therefore all the votes given to *Benſon* were thrown away, and he who had the moſt votes next to him

him is duly elected, and the borough ought not to have proceeded to a new election.

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But THE COURT held the new election to be good, as well for the miſtake in not knowing *Benſon* was no burgeſs, but a freeman at the time of his election to be a common-council-man, as for avoiding an inconveniency, which otherwiſe would be incurable.

So the election of *Devereux* was held good, and THE RULE diſcharged.

EASTER

EASTER TERM,

The Eighth of George the Firſt,

IN

The King's Bench.

Sir John Pratt, *Knt. Chief Juſtice.*

Sir Lyttleton Powis, *Knt.*
Sir Robert Eyre, *Knt.*
Sir John Forteſcue Aland, *Knt.* } *Juſtices.*

Sir Robert Raymond, *Knt. Attorney General.*
Sir Philip Yorke, *Knt. Solicitor General.*

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* The King *againſt* The Inhabitants of Brickhill. Caſe 23.

A tenant who is rated to the land-tax by the name of "The "Occupier of "*Roſcoes*," gains a ſettlement by paying ſuch rate. S. C. 19. Viner, 385. 2. Burr. 1062.

TWO JUSTICES OF THE PEACE made an order to remove one *Green* and his wife and ſeven children from the pariſh of *Horewood* to the pariſh of *Brickhill*; which order was confirmed upon an appeal to the ſeſſions, and both the ſaid orders were removed by *certiorari* into the court of king's bench.

THE CASE appeared to be thus: *Green* being a poor man lived laſt at *Horewood*, at a place called "*Roſcoe's Tenement*," and paid taxes there by the name of "The Occupier of *Roſcoes*;" and for that reaſon he and his wife and children were ſent thither.

IT WAS MOVED to quaſh theſe orders, becauſe this man ought to be perſonally charged to pay taxes, otherwiſe he gains no ſettlement by paying them as occupant of a tenement, though he was likewiſe charged as *farmer* thereof at that time; for that word "farmer" does not prove him to be occupant, becauſe he may let the tenement over to another.

But ON THE OTHER SIDE *it was inſiſted*, that paying taxes by the name of "Occupant of *Roſcoe's Tenement*," and naming him farmer of the ſame at that time, is a ſufficient deſignation of the perſon to gain a ſettlement there.

And

THE KING *againſt* THE INHABITANTS OF BRICKHILL.

And THE COURT being of that opinion, theſe orders were quaſhed (*a*).

(*a*) See Rex *v.* Uffculme, 2. Bott P. L. 233. Burr. S. C. 430. Painſwick *v.* Cirenceſter, Burr. S. C. 465. Openſhaw *v.* Gorton, Burr. S. C. 522. Rex *v.* Stanlake, Burr. S. C. 627. Rex *v.* Carſhalton, Burr. S. C. 809. Aſhley *v.* Walſall, Cald. 35. Rex *v.* Southwark, Cald. 62. Rex *v.* Heckmondwicke, Cald. 103. Rex *v.* Mitcham, Cald. 276. Rex *v.* Chew Magna, Cald. 365. Rex *v.* St. James, Bury, Cald. 385. Rex *v.* Llangammarch, 2. Term Rep. 628. Rex *v.* Folkſtone, 3. Term Rep. 505.—And ſee 2 vol. Mr. Conſt's edit. of Bott's Poor Laws, p. 227. to 281. where all the caſes on this ſubject are collected.

* [39]

Caſe 24.

* The King *againſt* Inhabitants of Rufford and Dunnington, in the County of Nottingham.

Overſeers may be appointed, under the 43. *Eliz.* c. 2 for an *extraparochial place*, if it be *a vill.*

S. C. 1. Stra. 512. Fort. 321.

A MANDAMUS was directed to the juſtices of the peace, &c. to appoint *overſeers of the poor* in the town of *Rufford*. The juſtices return, that *Rufford* is an *extraparochial place*, and therefore are not to provide for their poor.

IT WAS OBJECTED *againſt this return*, that admitting it was true, yet the juſtices are obliged by the ſtatute 43. *Eliz.* c. 2. to appoint *overſeers of the poor* even in *extraparochial places*, becauſe in the enacting part of the ſtatute the words are general, and extend to all places, *viz.* "That the churchwardens of every pariſh, and "two or more houſeholders there to be nominated yearly in *Eaſter* "week, or within one month after, under the hands and ſeals of the "juſtice of the peace, are to be called overſeers of the poor, &c."

ON THE OTHER SIDE *it was ſaid*, that the queſtion in this caſe was, whether *extraparochial places* are within this act; for as to the poor in general, the common law leaves them to their own induſtry, or to the charity of their neighbours. And it was argued, that *extraparochial places* are not within that ſtatute; that the beſt expoſitors of acts of parliament are the acts themſelves; now this act ſays, that the overſeers of the poor muſt meet monthly in "the "*pariſh-church* or *chapel*," which is a certain indication that an *extraparochial place* is not comprehended by the act, becauſe it is impoſſible for them to meet in a church or chapel where there is none; and there is a penalty of twenty ſhillings inflicted by the ſtatute for not meeting in ſuch place; that the juſtices have no power to appoint overſeers, for no ſtatutes that have been made for proviſion of the poor extend to *extraparochial places*; the ſtatute 43. *Eliz.* c. 2. only mentions "*pariſhes*," and ſeems to exclude *extraparochial places*, by making a particular proviſion for the iſland of *Fowlneſs*, in *Kent*, that place being no pariſh; the 13. & 14. *Car.* 2. c. 12. ſ. 21. enacts, "that ſeveral towns and vills "in particular counties ſhall be provided for and managed as pariſhes "are directed to be by 43. *Eliz.* by chuſing overſeers, &c.;" the ſtatute 1. *Jac.* 2. c. 17. ſect. 2. only uſes the word "pariſh;" and 3. & 4. *Will. & Mary*, c. 11. ſ. 2. uſes the words "pariſh or "town;" none of which ſtatutes extending by expreſs words to any

any *extraparochial places*, will not be enlarged by conſtruction of law; for privileges of *extraparochial places* are annexed to gentlemen's eſtates, of which they ought not to be deprived by any implication or conſtruction of law, but by plain, expreſs, and certain words. If it ſhould be objected, that it may be a great hardſhip to thoſe who would have a ſettlement in ſuch places, if they were not within this ſtatute, for then the poor could have no relief, the anſwer is, that it cannot be any hardſhip, becauſe they may remove to the place where their parents were ſettled, and there would be no hardſhip to any but only to baſtards born in ſuch places.

THE COURT was of opinion, that *extraparochial places* are within the words of the ſtatute; for the juſtices of the peace, by the general words, have power to name overſeers in all pariſhes, which muſt extend as well to *extraparochial places*, as to all pariſhes in general; and no ſubſequent words ſhall controul the general words in the enacting part; and certainly all the poor acts ſhall be conſtrued to extend * to ſuch places, as well as to other pariſhes, when they are within the ſame miſchief, and ſhall be ſubject to the controul of the juſtices of the peace; but the penalty for not meeting in the church ſhall never be inflicted on the overſeers of the poor, becauſe the inhabitants of *extraparochial places* have no church to meet in. Moſt of the foreſts in *England* are extraparochial, and ſo is *Chriſt-Church* in *Oxford*, but they ought to maintain their own poor. This is *a vill* conſiſting of ſeveral inhabitants, and ſo is within the proviſion of the ſtatute 13. & 14. *Car.* 2. c. 12. for *a vill* in a county, not therein particularly mentioned, will be within the remedy thereby provided; for all caſes within the reaſon are within the remedy of the law. There is no doubt but juſtices have the ſame power to appoint overſeers in *towns* and *vills*, though extraparochial, as in *pariſhes*: and this has been ſettled (*a*). The word "pariſh" is not in the body of ſtatute 43. *Eliz.* c. 2. but only in the preamble.

* [40]

Jones, 165. Palm. 485. Cro. Car. 498. The King *v.* Althoe, S. P. poſt. 144.

Let there be a *peremptory mandamus*; which afterwards iſſued, bearing *teſte* on the twenty-ſixth day of *April*, in the eighth year of *George the Firſt*.

EXTRACT FROM THE WRIT.

"*Cum oſtenſum ſit nobis ex gravi querelâ diverſorum inhabitan-*
"*tium parochiæ de* DONINGTON, *in com. noſtro* LINCOLN, *quod*
"*ſunt diverſi patres-familias,* ANGLICE "houſeholders," *et*
"*firmarii inhabitantes et reſidentes infra villam noſtram de*
"RUFFORD *in com. noſtro* NOTT. *prædicto ſubſtantiales et idonei,*
"ANGLICE "able," *ad equaliter contribuand. inter ſe pro et erga*
"*manutentionem et relevamen omnium pauperum ejuſdem villæ.*
"*Cumque nulli ſint guardian. eccleſiæ vel ſuperviſor. pauperum*
"*villæ de* RUFFORD *prædictæ per vos ſeu aliquos veſtrum adhuc*

(*a*) See Rex *v.* Welbeck, 1. Bott P. L. 24. Rex *v.* Showler and Atter, Burr. 1391. Rex *v.* Juſtices of Bedfordſhire, Cald. 167. Rex *v.* Juſtices of Peterborough, Cald. 238. Rex *v.* Ronton Abbey, 2. Term Rep. 207.

"*nominat,*

THE KING *againſt* INHABITANTS OF RUFFORD AND DUNNINGTON, IN THE COUNTY OF NOTTINGHAM

" *nominat. et appunctuat. infra eandem villam ad ſuſtend. aliquam*
" *equalem ratam ſive aſſeſſementum vel aliquas equales ratas ſive*
" *aſſeſſementa prout eis videbitur fore neceſſar. ſuper omnes et*
" *ſingulos patres-familias et firmarios prædict. inhabitant. et*
" *reſident. infra vil. prædict. pro et erga manutention. et relevamen*
" *pauperum villæ illius ad damnum non modicum et gravamen præ-*
" *dict. inhabitant. paroch. de* D. *in com. noſtro* L. *prædict. et*
" *pauperum dictæ villæ de* R. *in com. noſtro* NOTT. *ac in magnam*
" *indigentiam et oppreſſionem pauperum ejuſdem villæ: Nos igitur,*
" *&c. Teſte* JOHANNE PRATT, *milite apud* WESTM. *nono die*
" *Junii anno regni noſtri* (GEO. I.) *ſeptimo.*"

The return: " *Quod villa de* RUFFORD *in brevi inframentionat.*
" *vel alicujus inde parcell. non exiſtit nec tempore emanationis brevis*
" *prædict. vel unquam poſtea fuit pars parochiæ de* DONINGTON
" *in brevi prædict. mentionat. vel alicujus aliæ parochiæ, vel*
" *infra parochiam de* DONINGTON *præd. vel aliquam ali. parochiam,*
" *ſed villa de* RUFFORD *præd. eſt, et a tempore cujus contrar.*
" *memoria homin. non exiſtit, fuit locus extraparochialis abſq.*
" *aliquâ eccleſiâ ſeu capellâ parochian. ſeu al. ritibus*
" *parochial. villæ præd. ſeu inhabitantibus villæ præd. ſpectant.*
" *ſive pertinent. Quodq. per totum tempus præd. nunquam fuer.*
" *aliqui ſupervi ſores pauperum vel aliqui al. officiar. parochial.*
" *ejuſdem villæ de* RUFFORD. *Et eâ de cauſâ non nominavimus*
" *ſeu appunctuavimus nec nominare ſeu appunctuare poſſumus ſive*
" *debemus aliquas perſonas fore ſuperviſor. pauperum ejuſdem villæ*
" *de* RUFFORD."

Caſe 25.

Lock *againſt* Wright.

Hilary Term, 7. Geo. 1. Roll 353.

If *A.* covenant by a *deed-poll* to aſſign ſo much *ſcrip* as ſoon as the receipts ſhould be delivered, and *B.* covenant, *in conſideration* thereof, to accept the ſame, and to pay ſo much money to *A.* on a certain day for the ſaid *ſcrip*, a declaration in debt for non-payment of the money on the day, brought by *A.* on this agreement, muſt aver, that the ſcrip was aſſigned to *B.* or a tender to aſſign it made, when the receipts were delivered out.—S. C. 1. Stra 569. Poſt. 68. 1. Salk. 312. 171. 2. Lev. 23. 2. Saund. 351. Stra. 615. 712. 2. Burr. 899. 5. Com. Dig. "Pleader" (C. 53.). Cowp. 56. Dougl. 690. 1. Bac. Abr. "Covenant" (B.).

DEBT UPON CERTAIN ARTICLES, dated the ſixteenth day of *September* 1720, for the penalty on a bond for not performing covenants on a *South-Sea* contract.

THE CASE was this: The plaintiff *Lock* by a deed-poll covenanted to aſſign five hundred pounds *South-Sea* ſtock, or credit in the fourth ſubſcription, to the defendant, as ſoon as the receipts ſhould be delivered out; and the defendant covenanted, in conſideration thereof, to accept the receipts as ſoon as the ſame ſhould be delivered out, and to pay nine hundred and fifty pounds to the plaintiff on the ſixteenth day of *November* following, for the ſaid five hundred pounds credit.

Afterwards, by an act of parliament, 7. *Geo.* 1. ſt. 2. c. 1. the Company were prohibited from giving any receipts for ſo long time.

And

And now in an action of debt upon the covenant brought by the plaintiff, he declared, that the defendant, *pro conſideratione* of the ſaid ſtock ſold to him, covenanted to pay nine hundred and fifty pounds to the plaintiff at ſuch a time, and aſſigned the breach in non-payment of the money at the time, *viz.* on the ſaid ſixteenth day of *November*, *ſecundum formam articulorum*, and therefore demanded the penalty.

The defendant demurred to the declaration, becauſe the plaintiff had not ſet forth that he delivered the receipts, or averred *a tender* thereof.

IT WAS ARGUED *for the defendant*, that this declaration was ill, becauſe the plaintiff had not alledged the performance of the covenants on his part, which he (*a*) ought to have done to entitle him to this action, it being in the nature of a *condition* (*b*) *precedent*, and not of *mutual covenants*; to prove which the authorities in the margin were (*c*) cited.

ON THE OTHER SIDE the Counſel *for the plaintiff* argued, that this declaration was good, becauſe the defendant was to pay the money on a certain day; but there was no indefinite term for the delivery of the ſtock; for that was to be delivered when the books of the Company were opened; therefore although the plaintiff was hindered to deliver the ſtock before the day appointed for the payment of the money, yet the defendant ought to pay it on the very day he had covenanted ſo to do; for this was a contract *executed*, * and not *executory*; and from the very time of the agreement the defendant had credit for the ſtock. It is true, he had no remedy at law to recover it; but he had a proper remedy in equity, and he could have no other if he had the receipts, for theſe are only an evidence that he had ſo much ſtock in the Company. Beſides, this is an action of covenant upon a ſpecialty, in which it is not requiſite to lay a conſideration to entitle the plaintiff to the action; therefore, though he alledged that he covenanted to aſſign the ſtock, &c. and that the defendant *pro conſideratione inde* covenanted to pay the money, this does not deſtroy the ſpecialty; for he cannot give ſuch conſideration in evidence at or before the day of payment of the money, being tied up by an act of parliament, to which every man is virtually a party; and the covenant on the defendant's part being to accept the receipts whenever the Company would give them, and to pay the money on a certain day, he ought therefore to pay it on that day, and not to wait the time of the delivery of the receipts, which by the original agreement was indefinite.

* [41]

THE COURT, upon the firſt argument of this caſe, was of opinion, that ſince it was agreed by the Counſel for the plaintiff, that the

(*a*) 7. Co. 9. 1. Lev. 87.
(*b*) Dyer, 76. Hob. 41. 1. Saund. 320.
(*c*) Dyer, 76. Plowd. Com. 209. 482, 483. 7. Rep. 38. Saund. 320. Vent. 147. 371. Lutw. 490. 3. Mod. 39. Salk. 172. Com. Rep. 98. pl. 67. Ld. Raym. 238. 662. 12. Mod. 455.

Lock *againſt* Wright.

defendant had no remedy for this ſtock but in a court of equity, it would ſcarcely be allowed that an equitable intereſt will be a good conſideration to ſupport an action at law; and that the caſe which comes neareſt to the principal caſe in ſenſe happened in the time of Holt, *Chief Juſtice*, which was thus (*a*): A man hired another for a year; and it was agreed on all ſides, that the perſon thus hired could have no action for his wages until the year was expired; but if the maſter had covenanted to pay it on a certain day within the year, in ſuch caſe an action would lie before the year was ended. But the principal caſe goes farther, for there the conſideration was merely an equitable intereſt.

Afterwards, in *Trinity Term*, in the ninth year of *George the Firſt*, the following judgment was given for the defendant, becauſe this deed of covenants being only A DEED-POLL, it is, for that reaſon, the deed of the defendant only; and therefore the covenants cannot be mutual; and it would be very hard that the plaintiff ſhould maintain this action for the money before he transfers or tenders to transfer the ſtock, when the defendant has no remedy to recover it at law, but only a right to have it decreed to him in equity. * In all executory agreements, and this is one, where one thing is to be performed *pro* or *in* conſideration of the performance of ſomething on the other part, the word "*pro*" amounts to a *condition precedent*, ſo that the plaintiff cannot ſue without averring a performance of the condition; where "*pro*" denotes the conſideration, it is a condition precedent; "*pro*" is a proper word to create a condition (*b*). In a grant of an annuity *pro unâ acrâ terræ*, the word *pro* ſhews the cauſe of the grant, and therefore amounts to a condition; for if the acre be evicted, the annuity ceaſes (*c*); but a feoffment of land *pro conſilio impenſo*, &c. if the feoffee deny Counſel, yet the feoffor cannot re-enter, for the ſale of the land is executed. As "*pro*" is a proper word of condition, ſo it may be conſtrued either precedent or ſubſequent, as beſt anſwers the intent of the parties. If I ſell a horſe for ten pounds, the vendee cannot ſue for the horſe, without averring payment, or tender of the money. The ſeveral diſtinctions in the caſe of *Thorpe v. Thorpe* (*d*) are very nice and reaſonable. So is the caſe of *Colonel v. Biggs* (*e*), which was thus: An agreement was made that the defendant ſhould pay ſo much money within ſix months, the plaintiff transferring his ſtock, which he agreed to do, the defendant paying the money agreed on; and it was adjudged, that if either party ſue upon this agreement, the one muſt aver and prove a transfer of the ſtock, or a tender to be transferred, and the other muſt aver and prove the payment of the money, or a tender of payment, becauſe the transferring in the firſt part of the agreement is a *condition precedent*; and though theſe are *mutual promiſes*, yet where the

* [42]

(*a*) See 3. Viner's Abr. 7.
(*b*) Co. Lit. 204. a.
(*c*) 7 Co. 10.
(*d*) 1. Ld Ray. 662. Comy. Rep. 98.
(*e*) 1. Salk. 112. And this caſe in Salkeld is infinitely ſtronger according to the *manuſcript*; but not ſo ſtrong according to Strange, 572.

one

Lock *againſt* Wright.

one thing to be done is the conſideration for doing the other, the performance of that thing muſt be averred. It is true, the Book goes farther, *viz.* "unleſs there is a certain day appointed for the "performance," which makes it exactly like the principal caſe. So where in an action on the caſe the plaintiff declared, that there being a diſcourſe of a mortgage, &c (*a*), the plaintiff agreed to releaſe the equity of redemption, and, in conſideration thereof, the defendant agreed to pay ſeven pounds, and there were mutual promiſes laid, and the plaintiff averred the performance on his part, and that the defendant had not paid the ſeven pounds, it was adjudged, that the releaſing the equity of redemption was part of the agreement which the plaintiff ought to execute, for it was upon that conſideration that the defendant was to pay the money; therefore the releaſe was to precede, and until that was executed the plaintiff had no cauſe of action. Now in the principal caſe, that this is A DEED POLL, they grounded their opinion upon the caſe of *Pordage v. Cole (b)*, which was thus: There was an agreement in writing between the parties, that the one ſhould pay five hundred pounds to the other for all his lands, in witneſs, &c.; this agreement was mutually executed, &c. and afterwards the plaintiff brought an action of debt for the five hundred pounds, without averring in his declaration, that he had conveyed the lands, or tendered a conveyance thereof; and it was adjudged, that after the day was paſt, on which, by agreement, the lands were to be conveyed, the action was well brought for the money, becauſe this was a * mutual agreement, upon which either party has a mutual remedy; but it is otherwiſe where the prepoſition "*pro*" makes it a *condition precedent:* and the Court held, that it would have been otherwiſe in the caſe laſt mentioned, if it had been the deed of one of the parties. The true diſtinction is between A DEED-POLL and AN INDENTURE executed by both parties; if one agree to do an act, and the other agree to pay *pro* the act, the firſt perſon cannot ſue for the money without averring performance of the act: "*pro*" does not make a *condition precedent*, where the deed ſhews the intent of the parties to be contrary; as if the money be agreed to be paid before the act can be done. In this caſe the defendant has no remedy to compel a transfer of the ſtock, if he pays the money.

* [43]

See Stra. 572. Ld. Raym. 665.

Wherefore judgment was given for the defendant (*c*).

(*a*) Salk. 172. Lutw. 245.

(*b*) Saund. 319. 2. Keb. 542. Raym. 188. 1. Sid. 423. 1. Vent. 147. 1. Lev. 274.

(*c*) See Wyvel *v.* Stapleton, poſt. 69. Blackwell *v.* Naſh, poſt. 105. Shelburn *v.* Stapleton, poſt. 294. Bullock *v.* Noke, Stra. 579. Duke of Rutland *v.* Hodgſon, Stra. 577. Bowles *v.* Bridges, Stra. 832. Rhodes *v.* Lovit, Dunb. 70. Merit *v.* Rome, Stra. 458. Clark *v.* Tyſon, Stra. 504. Dawſon *v.* Myer, Stra. 712. Jones *v.* Barkley, Dougl. 685.

Caſe 26.

Lawrence *againſt* Jacob.

Thurſday, 26 *April* 1722.

In an action on a promiſſory note againſt the indorſor, the plaintiff need not alledge a demand on drawer.

S. C. 1. Stra. 515. Stra. 649. Com. Rep. 563. pl. 240. Pract. Reg. C.P. 358.

UPON A WRIT OF ERROR in the court of king's bench upon a judgment in the common pleas the caſe was:

The plaintiff, who was the executor of a ſecond indorſee of a promiſſory note, brought an action againſt the indorſor for default of payment by the indorſor; and after a demurrer to the declaration, and judgment for the plaintiff in the common pleas,

A writ of error was brought in the court of king's bench.

The error aſſigned was, that the plaintiff in his declaration did not ſet forth that the drawer had notice of the indorſement, nor any demand or default alledged in the drawer.

Sed non allocatur: it being the conſtant form, and matter of evidence.

The judgment was affirmed (*a*).

(*a*) The ſame point was determined in the caſe of Ship *v.* Hook, Eaſter Term, 10. *Geo.* 2. on the authority of this caſe, and on the reaſon of the thing; for the defendant by his *demurrer* admits, that in conſideration of the premiſes, *viz.* the defendant's making the indorſable note, and the indorſing it to the plaintiff, the defendant aſſumed to pay the money, according to the tenor of the note, Comy. Rep. 562. NOTE *to former edition.*— In the caſe of Bromley *v.* Farren alſo the ſame point was determined, 1. Stra. 441. But in the caſe of Collins *v.* Butler, Hilary Term, 11. *Geo.* 2. LEE, *Chief Juſtice*, held, that a demand upon the drawer is neceſſary before an indorſor can be charged, 2. Stra. 1087. And it appears, that the Judges were for ſome time of different opinions on this ſubject, 2. Burr. 671. But in the caſe of Heylin *v.* Adamſon, Mich. Term, 32. *Geo.* 2. it was determined, that in actions on *inland bills of exchange* by an indorſee againſt an indorſor, the plaintiff muſt prove a demand of, or due diligence to get, the money from the drawee or acceptor, but need not prove any demand of the drawer; and that in actions on *promiſſory notes*, by an indorſee againſt an indorſor, the plaintiff muſt prove a demand of a due diligence to get the money from the maker of the note; 2. Burr. Rep. 678. And in an action againſt the drawer or indorſor of a bill, it is neceſſary to ſtate a demand of payment from the acceptor of the bill, or the maker of the note, and due notice of refuſal given to the defendant, Ruſton *v.* Aſpinal, Dougl. 680.

Caſe 27.

Colvin *againſt* Fletcher.

A plea in diſability of the plaintiff cannot be pleaded after a general imparlance.

S. C. 1. Stra. 520. Dyer, 210. 1. Vent. 236. Latch, 83. 2. Sid. 29. Lutw. 639. 1. Mod. 14. 3. Lev. 208. 334. 1. Ld. Ray. 243.

DEBT UPON BOND againſt the defendant, who after a *general imparlance* pleaded the ſtatute of 1. *Geo.* 1. ſt. 2. c. 13. ſ. 23. and recuſancy in diſability of the perſon of the plaintiff, and therefore prayed *quod loquela prædicta remaneat inde ſine die.*

IT WAS OBJECTED, upon a demurrer to this plea, that it ought not to be allowed after *an imparlance*, becauſe pleas in diſability are

dilatory,

dilatory, and therefore ſhould be pleaded at firſt; and to prove this, the caſes in the margin were cited (*a*).

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TO WHICH *it was anſwered*, that the reaſon of thoſe caſes does not come up to the preſent caſe, becauſe thoſe were all pleas in *abatement* of the writ; and in ſuch caſe, if it be abated, the plaintiff may have a new writ; but this is in *diſability* of having any writ at all during his recuſancy; and therefore

A SECOND OBJECTION was, that this plea is ill (*b*), for that it concluded *prout patet de recordo*; for the conviction of recuſancy being at THE SESSIONS, which is a record of another court, it ſhould be immediately pleaded with a *profert hic in curiâ ſub pede ſigilli*. Becauſe the plea is but dilatory, unleſs the record be in the ſame court, for the defendant ſhall not have a day allowed him to bring in the record (*c*). In anſwer to this objection it will be ſaid, that the record of a conviction is certified into this court, and being of record here need not be pleaded *ſub pede ſigilli*. But the words of 1. *Geo.* 1. ſt. 2. c. 13. are, "If the perſon to whom the oath "ſhall be ſo tendered ſhall neglect or refuſe to take the ſame, "ſuch juſtices, &c. ſhall certify the refuſal thereof to the next "quarter ſeſſions of the county, &c. and the ſaid refuſal ſhall be "recorded amongſt THE ROLLS of that ſeſſions, and ſhall be from "thence certified by the clerk of the peace, &c. into the court of "chancery or king's bench, &c. there to be recorded, &c. and "every ſuch perſon, &c. ſhall, from the time of his refuſal, be "adjudged a popiſh recuſant convict;" ſo that the record remains at the ſeſſions, and the refuſal only is certified here. Beſides, this certificate being made by the clerk of the peace is traverſable (*d*), for he is no more than a miniſterial officer, and therefore it is not a record to conclude the judgment of this court. And if the facts contained in the certificate may be denied, it is but reaſonable to plead the certificate *ſub pede ſigilli*.

In debt on bond, if the defendant plead in diſability of the plaintiff, that he was convicted of recuſancy at *the ſeſſions* for ſuch a county for not taking the oaths preſcribed by 1. *Geo.* 1. c. 13. the record muſt be pleaded *ſub pede ſigilli*, although it is certified into the king's bench, purſuant to the directions of the ſtatute.

S. C. 1. Str. 521. Co. Lit. 128. 3. Lev. 334. Lutw. 1100.

*TO WHICH *it was anſwered*, that a record in the ſame court where it is pleaded need not be ſhewn *ſub pede ſigilli* (*e*), which I admit to be neceſſary where the record remains in another court. The ſtatute 1. *Geo.* c. 13. creates the diſability from the refuſal of the oaths, and not from the time of the refuſal recorded. The record is only evidence of the refuſal, it does not create the diſability; ſo that the preſent caſe is very different from the caſes quoted; for there the record is the diſability, as the judgment in the caſe of an outlawry, which is the record. If the certificate made by the clerk of the peace to this court of the refuſal which was

* [44]

(*a*) Co. Lit. 128. 1. Mod. 14. 1. Lev. 89. 3. Lev. 343. 1 Vent. 76. 135. Yelv. 112. Lutw. 1100.

(*b*) The plea begins, "*quod prædictus* "the defendant *ad billam ipſius querentis* "*reſpondere non debet.*"—NOTE *to former edition.*

(*c*) Lutw. 17, 18. 2. Lutw. 1100. Co. Lit. 128. a. b. Lit. Ten. ſect. 212. Bro. Abr. tit. "Record" pl. 36. 3. Lev. Rep. 334. Com. Rep. 307. pl. 158. where a plea of a recuſant convict was adjudged ill for this exception.

(*d*) Moor, 541. 1. Leon. 205.

(*e*) Co. Lit. 128. b.

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recorded at the ſeſſions, be traverſable ſo that the facts therein contained lie open to be examined, the conſequence will be, that there is no need to plead the record *ſub pede ſigilli*, ſince the certificate is no record, only an evidence. Pleading the record *ſub pede ſigilli*, when the record does not create the diſability, would vitiate the plea. When a defendant pleads "another action depending," he never pleads the record *ſub pede ſigilli*, becauſe other facts are neceſſary to be proved, as that the actions were brought for one and the ſame cauſe. If the record make the diſability, yet it does not remain in the ſeſſions, but is tranſmitted into this court as effectually as if it had been removed by *certiorari*, ſince the act ſupplies a *certiorari*. It is true, the *clerk of the peace* in certifying this record is but a miniſterial officer; but it is not a material objection for the plaintiff to ſay ſo, becauſe he has an opportunity to traverſe it, and to try the fact; but here the plaintiff, by demurring to this plea, has owned the fact, which otherwiſe ought to have been proved by the record. In the caſe of *Fitz-Harris v. Boiun* (*a*), the plaintiff was to prove an arreſt, and becauſe he did not produce the writ, the defendant demurred upon the evidence; and it was adjudged, that the writ ought to have been produced in evidence; but the demurrer confeſſed the arreſt, being a matter of fact, though to be proved by a matter of record.

BUT THIS WAS DENIED *by the Counſel for the plaintiff*, who argued, that, by the demurrer, the fact was not confeſſed; for the plaintiff demurred, becauſe the defendant had not pleaded the fact, and not to the fact pleaded.

Quære, Whether in a plea of *recuſancy* pleaded in *diſability*, it be neceſſary to aver that *the default* was recorded at THE SESSIONS.

THE THIRD OBJECTION was, that the ſtatute 3. *Jac.* 1. c. 4. gives the ſeſſions power to make proclamation againſt recuſants to render themſelves, &c. which if they do not, and that the default is recorded, that ſhall be taken for as ſufficient a conviction as a trial by verdict. Now the defendant has not pleaded, that any ſuch default was recorded at the ſeſſions; therefore this being in a criminal caſe, wherein the utmoſt certainty is required, this plea cannot be good without purſuing all the circumſtances required by the act.

THE ANSWER WAS, that the ſtatute requires the conviction ſhould be certified into THE EXCHEQUER with ſuch convenient certainty that the Court may award proceſs thereon; and the defendant has pleaded, that it was certified there, which could not have been done unleſs the default had been recorded at the ſeſſions.

Quære, Whether a plea of *recuſancy* pleaded in diſability of the plaintiff, praying *quod loquela remaneat ſine die* be good. 1. Lev. 26.

ANOTHER OBJECTION was, that this plea was wrong concluded, for it was, that the defendant *eat inde ſine die*, when it ſhould be *ideo loquela præd. remaneat ſine die quouſque*; for the diſability is no abſolute bar, but temporary only until conformity; as an outlawry pleaded in diſability of the perſon ought to conclude *ſi reſpondere*

(*a*) 1. Lev. 87.

deri

deri debet; for if after ſuch plea the plaintiff obtain his charter of pardon, or reverſe the outlawry, the defendant ſhall anſwer, for then the plaintiff is reſtored to the law; for the diſability does not abate the writ, it only diſables the plaintiff until a pardon or reverſal of the outlawry (*a*). It is the ſame in the caſe of an excommunication, which does not abate the writ, but only diſables the plaintiff from proceeding until he purchaſe letters of abſolution (*b*).

TO WHICH *it was anſwered*, that the commencement and concluſion of the plea are both proper for a plea in abatement: though *quouſque* is omitted, yet the plea is good, for in many precedents of the like nature there are the ſame omiſſions; "*unde petit judi-*" *cium ſi reſponderi debet*," is the legal concluſion of a plea in diſability of the perſon, and would be ſufficient without any further prayer (*c*). When a plea in abatement begins properly as ſuch, it will be good, though the defendant conclude it with praying an improper judgment; for the Court is to give a proper judgment (*d*). In the caſe of *Bilſon v. Croſs* (*e*), an action of replevin was brought in the common pleas for taking a mare; the defendant pleaded firſt "in another place," and concluded with a *petit judicium et retorn. equæ præfat.*;" the plaintiff took iſſue on the taking "in "another place;" the defendant demurred, and concluded *unde ut prius petit judicium, et quod narratio caſſetur*; and judgment in the common pleas for the plaintiff; and on a writ of error it was inſiſted, that there was *a diſcontinuance*, the plea being *in bar*, and the demurrer *in abatement*; but the judgment was affirmed, the demurrer being in bar, for "*unde ut prius petit judicium*" was ſufficient, and the reſt which followed was rejected as ſurpluſage; and judgment final was given in the common pleas, the plea concluding *in bar*, though the matter pleaded was matter *of abatement*.

EYRE, *Juſtice*. "*Quod narratio caſſetur*" is a concluſion in bar. The precedent in *Raſt. Ent.* 319. *b.* is a plea of excommunication, and concludes, *quod loquela remaneat quouſque*.

* [45]

THE FIFTH OBJECTION to this plea was, that the defendant did not ſet forth, that the plaintiff had not taken the oaths ſince the king's acceſſion to the crown; for if in fact he had taken them ſince that time, then the ſtatute does not extend to him, therefore this matter ought to have been ſpecially ſet forth like a precedent condition, by him who is to have the benefit of it, *viz.* that the plaintiff was a perſon on whom the act attaches. * For by the ſtatute 1. *Geo.* 1. c. 13. it is enacted, "That all perſons who ſhall "take and ſubſcribe the oaths in the manner appointed by that act, "are indemnified from any penalties and incapacities, &c. incurred "by any former neglect." This may be compared to a plea of a

A plea in diſability, for not having taken the oaths preſcribed by 1. *Geo.* 1. c. 13. muſt ſhew, that he is not within the *proviſo* of the ſtatute which exempts thoſe from the penalty who have before taken the oaths required.—1. Vent. 148. 1. Sid. 303.

(*a*) Co. Lit. 128. b. 5. Co. 109.
(*b*) Co. Lit. 134. b.
(*c*) Co. Lit. 128. a.
(*d*) 1. Lev. 222. Raſt. Ent. 333. Lev. Ent. 11. Thompſon, 191. Brownl. E. R. 466.
(*e*) In the common pleas, in Hilary Term, 2. *Anne*.

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pardon, which muſt aver, that the defendant is a perſon not excepted in the act (*a*). A clauſe coming by way of proviſo or exception, as this does, is the ſame in reſpect of pleading.

THE ANSWER was, that by the next clauſe in that ſtatute it appears, that this does not extend to any perſon, other than ſuch who entitle themſelves to any offices or places of truſt, for thoſe only are indemnified from any incapacity incurred, and may bring any action if they have taken the oaths ſince the king's acceſſion to the crown. Beſides, the plaintiff ought to ſhew that he was excepted by virtue of the proviſo, the defendant having ſworn that he is included within the purview of the act.

Sed adjournatur.

And in *Eaſter Term*, in the eleventh year of *George the Firſt*, THE COURT granted a *reſpondeas ouſter*.

(*a*) Poſt. 59. Foſter C. L. 87. 4. Hawk. P. C. ch. 37. ſ. 60.

Caſe 28. The King *againſt* Selfe.

If a perſon be convicted of forgery at the aſſizes, and the judgment arreſted, but, by the miſtake of the clerk, not entered; *quære*, Whether the court of king's bench will order the judgment to be entered on record.

1. Roll. Abr. 201.
1. Lev. 189.
2. Bulſt. 35.
1. Vent. 13.
Bunb. 24.
4. Mod. 396.
Stra. 843. 786.
2. Ld. Ray. 1518.
1. Salk. 47. 53.

THE DEFENDANT was indicted at the aſſiſes for forging *ſtamps*, and appeared there upon his recognizance to anſwer the indictment. He pleaded *not guilty*, and, upon his trial, he was convicted; but upon a motion in arreſt of judgment it was ſet aſide.

Afterwards he exhibited a *bill in chancery* againſt the proſecutor of the indictment, who pleaded this conviction of forgery in bar to the bill.

The plaintiff in chancery now moved the court of king's bench, that THE RECORD might be made up with the arreſt of the judgment; for that, by a miſtake of the clerk of the aſſiſe, that was not recorded, nor did there any notes thereof appear in his books, but only that he was bound over by recognizance to appear at the aſſiſes, and that he did accordingly appear and ſaved his recognizance.

THE COURT, although this matter was evident by the records of the aſſiſes, would make no rule for the record to be made up with the arreſt of judgment, becauſe a precedent of this nature might be of dangerous conſequence; and therefore deſired that the cauſe might be put into THE PAPER, and be ſpoke to again, that it might be judicially determined.

The

The King *againſt* Okey.

Caſe 29.

A RULE was granted, to ſhew cauſe why an information ſhould not be filed againſt the defendant, who was a juſtice of the peace, for ſending the proſecutor to the houſe of correction without a ſufficient cauſe.

An information lies againſt a juſtice for ſending a *ſervant* to the houſe of correction for being ſaucy to his *maſter*.

Andr. 272.

And now he ſhewed for cauſe, that the proſecutor was a ſervant to *L. R.* who complained to the defendant, that his * ſaid ſervant was ſaucy, and gave his horſes too much corn.

THE COURT held, this was not a ſufficient cauſe to ſend a man to the houſe of correction.

* [46]

So leave was given by the Court to file an information againſt the juſtice of the peace.

TRINITY TERM,

The Eighth of George the First,

IN

The Court of Exchequer.

Sir James Montague, *Knt. Chief Baron.*

Sir Francis Page, *Knt.*
Sir Bernard Hale, *Knt.*
Sir , *Knt.*
} *Barons.*

Sir Robert Raymond, *Knt. Attorney General,*
Sir Philip Yorke, *Knt. Solicitor General,*

Lord Coningſby's Caſe.

Caſe 30.

If a rule to plead in *four days* be made on *Thurſday*, a plea filed in the office on the *Tueſday* following is good; for *Sunday* is not one of the four days.

Imp. Pract. 308.

BY RULE OF COURT made on a *Thurſday* in the ſaid Term, it was ordered, that the defendant ſhould plead in *four days* after, and the plea came into the office on *Tueſday* after, and not before, which the attorney for the now plaintiffs refuſed.

IT WAS INSISTED by their Counſel, that it ought not to be received; for though by the courſe of the court the defendant has *four days* excluſive to plead, yet ſuch cuſtom will not warrant five days excluſive, which was this caſe, becaule *Sunday* ſhall be reckoned as one of the days, as well as it is one of the *fourteen days* (*a*), where notice is given of a trial; it is true, pleas have been received on the fifth day, but never where the matter was conteſted.

THE COURT anſwered, that the pleas which are now put into the reſpective offices of the ſeveral courts were originally pleaded in court; and that the defendant may as well plead on the firſt as on the ſecond day, or the fourth day; but that now by the courſe of

(*a*) By 14 *Geo.* 2. c. 17 § 4. "No "indictment, information, or cauſe "whatſoever, ſhall be tried at *niſi prius*, "or at the ſittings in *London* or *Weſtmin-* "*ſter*, where the defendant reſides above "forty miles from the ſaid cities reſpec- "tively, unleſs notice of trial in writing "has been given at leaſt *ten days* before "ſuch intended trial."

the

LORD CONINGSBY'S CASE.

the Court, if the defendant do not plead within *four days*, the plaintiff may ſign judgment for want of a plea; but theſe *four days* muſt always be reckoned ſuch days wherein the defendants may plead, and when the offices are open; and therefore *Sunday* is never reckoned one of thoſe days, becauſe neither courts nor offices are then open. And this is not like the caſe mentioned on the other ſide, where *Sunday* is reckoned one of the *fourteen days* for giving notice of trial, becauſe a man may prepare for his journey, or come up to *London* on that day (*a*), as well as on any other day of the week.

And for this reaſon it was reſolved, that the plea ſhould be received (*b*).

(*a*) *Sed quære*; and ſee Taſhmaker *v.* the Hundred of Edmonton, Stra. 406. Comy. Rep. 345.

(*b*) NOTE, This is contrary to the caſe of *Aſhmole v. Goodwin*, 2. Salk. 624. where it is held that, as to rules for pleading, *Sundays* and *Holidays* ſhall be accounted as other days of the week. NOTE *to former edition.*—And ſee S. C. 1. Stra. 86. unleſs *Sunday* be the firſt or laſt day, 2. Salk. 624. Tidd's Pract. 251, Impey's Pract. 5th edit. 231.

TRINITY TERM,

The Eighth of George the Firſt,

IN

The King's Bench.

1722.

Sir John Pratt, *Knt. Chief Juſtice.*
Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Juſtices.*
Sir John Forteſcue Aland, *Knt.*
Sir Robert Raymond, *Knt. Attorney General.*
Sir Philip Yorke, *Knt. Solicitor General.*

Mayhoe *againſt* Archer.

Caſe 31.

A perſon who rents a farm of 300l. a-year; plants part of the land with potatoes for *ſale*; buys of ſeveral perſons potatoes at ſeveral times and places for ſeveral years to the amount of 500l. a-year; and ſells them again for the purpoſe of gaining his living, is *a trader* within the meaning of the bankrupt laws.

IN A SPECIAL VERDICT the caſe was thus: THE JURY found that *Richard Baxter* rented a farm, for which he paid three hundred pounds a-year; that he planted *potatoes* on part of the lands which he farmed; that he bought great quantities of potatoes to utter and ſell again for profit; and that for ſeveral years paſt he had dealt with ſeveral perſons in potatoes at ſeveral times and places, had employed warehouſes where he put in potatoes, had ſerved ſeveral markets therewith, and had ſold *great quantities* thereof for profit, and for his living, &c.

Upon this ſpecial verdict there were two points raiſed:

FIRST, Whether the jury have found enough to make *Baxter* a trader within any of the ſtatutes made againſt bankrupts.

SECONDLY, Whether *a farmer* who ſells potatoes, though he buy ſeveral other great quantities thereof, and get his living thereby, is within any of the ſaid acts.

2. C. 1. Stra. 513. Cro. Car. 549. Jones, 437. 3. Lev. 309. 3. Mod. 327. Ld. Ray. 287. 2. Peer. Wms. 308. 3. Peer. Wms. 298. 2. Bac. Abr. "Bankrupt" (A.).

As

MAYNOR *againſt* ARCHER.

* AS TO THE FIRST POINT it was argued, that the jury had found enough to make *Baxter* a trader within the ſtatutes of bankruptcy; for though farmers or innkeepers, *quatenus* ſuch, are not within thoſe ſtatutes, yet as traders they are; and here, though the jury have found that *Baxter* was a farmer, yet they likewiſe find, that he was a trader in potatoes, which he bought and ſold; and there is a caſe adjudged in this very point: If a farmer buy and ſell butter and cheeſe, he ſhall be accounted a trader (*a*). If ſuch a trader fail to pay his debts he is a bankrupt, and by this means he is a criminal; and therefore the law ſhall be conſtrued againſt him very ſtrictly in favour of his creditors. If a man has ſeveral trades, whereof one is within, and another not within the ſtatutes; yet he ſhall be accounted a trader, ſo as to make him a bankrupt; and ſo ſhall a lawyer dealing in coals. And the dealing more in one commodity than in another does not alter the caſe; for no man, except the trader himſelf, can tell in what commodity he moſtly deals; therefore that trading which is the moſt viſible means of his livelihood is to be regarded. Now in the principal caſe it is apparent, that by dealing in potatoes *Baxter* got credit, and probably of ſeveral perſons who did not know that he rented a farm; but if he did not, yet there are ſufficient words in this verdict to make him a trader, it being found that he ſold ſeveral *great quantities* of potatoes, &c.

March, 35. Vent. 166. 129. Lev. 17. Sid. 411.

SECOND POINT. There are many great *hop-merchants* in *England* who have hop-yards of their own, but yet ſhall be accounted traders, ſo as to ſubject them to the ſtatutes of bankruptcy. This trade of dealing in potatoes, though he was likewiſe *a farmer*, may be compared to the caſe where, if the plaintiff libel for tithes of faggot-wood, and the defendant ſuggeſt for a prohibition, that no tithes ought to be paid for oak faggots, the plaintiff in his prayer for a conſultation may ſhew, that the defendant had ſo ſorted the faggots that it was impoſſible for him to take the tithes of the one without the other (*b*).

Yel. 119. Poph. 38. 2. Lev. 80. Sid. 38. T. Jones, 438.

IT WAS ARGUED *on the other ſide*, that this caſe, as found by this verdict, is not within the intention of any of the ſtatutes of bankruptcy, becauſe it is not found that *Baxter* got his livelihood by the buying and ſelling of potatoes; for if he bought ſome, and had ſome of the growth of the lands which he rented, he is not a trader within any * of thoſe ſtatutes; for a farmer who bought and ſold cattle was adjudged no trader ſo as to make him a bankrupt; nor an innkeeper who lays in malt and corn; neither ſhall a farmer who deals in turneps be accounted a trader.

*[48]

THE COURT being divided, no judgment was given.

TWO OF THE JUDGES ſeemed to be of opinion, that where a man buys great quantities of wool or hops, though he has a farm, and ſheep of his own, and ſeveral hop-gardens, he ſhall be accounted

(*a*) Cro. Car. 549. (*b*) Buckhurſt *v.* Newnton, Cro. Eliz. 347.

a trader

a trader in thoſe commodities; and ſo ſhall an inn-keeper, if he turn corn-chandler. It is true, the jury have not found that *Baxter* got the chief part of his livelihood by buying and ſelling potatoes, but it is not the quantity which is material, if it is in proportion to other goods which he buys and ſells; for if a man have an orchard, and buy ſeveral quantities of fruit of other people, though not ſo many as he has in his own orchard, yet this ſhall make him a trader, and conſequently ſubject him to the ſtatutes of bankruptcy.

THE TWO OTHER JUDGES were of a contrary opinion, *viz.* that here was not enough found by this verdict to make *Baxter* a bankrupt; for a farmer is no trader within any of the acts before-mentioned, *quatenus* a farmer; and though he uſe another trade, yet if that is not the principal means of his livelihood, he is not a trader within thoſe ſtatutes. It is true, if buying and ſelling in any trade be the chief means of his livelihood, then he is a trader within the acts of bankruptcy; but that is matter to be given in evidence, and found by the jury, which was not done in this caſe. Therefore they held, that this was an inſufficient verdict, becauſe the jury did not find that *Baxter* by buying and ſelling potatoes got the chief part of his livelihood, or that it exceeded his farming trade, for all that the ſtatute requires is, that trading ſhould be the chief matter to make him a bankrupt (*a*).

AFTERWARDS, *in Trinity Term*, the Counſel for the plaintiff finding the Judges differed in opinion, moved for a *venire facias de novo*, or that the Court would give leave to *mend* this ſpecial verdict upon the affidavit of one of the witneſſes at the trial, that *Baxter* bought potatoes ſeveral years, to the value of five hundred pounds a-year.

A ſpecial verdict may be amended by notes taken by the clerk at the trial, or on the affidavit of one of the witneſſes depoſing that the fact in which the amendment is required was proved at the trial.

Thereupon a rule was made for the other ſide to * ſhew cauſe why the verdict ſhould not be amended.

* [49]

The cauſe which they ſhewed was, that though this witneſs had ſworn the ſame thing at the trial, yet it was without precedent to have a verdict (which is a record) to be amended by ſuch an affidavit; for though it was the ſame which was given in evidence before, yet the jury did not believe it, or probably there might be other evidence at the trial to diſprove it.

S. C. Stra. 514. 1. Roll. Abr. 203. 4. Co. 52. Cro. Eliz. 112. 150. Cro. Car. 338. Bunb. 283. Stra. 1197. 1. Wilſ. 33. Dougl. 746.

But THE COURT was of opinion, that a ſpecial verdict might be amended by notes taken by the clerk at the trial, or on proof of the certainty of what was then given in evidence; and the ſame was ruled accordingly upon payment of coſts.

In *Michaelmas Term*, in the ninth year of *George the Firſt*, after the amendment, THE COURT held him *a trader*, ſaying, there was

(*a*) See Newton *v.* Trigg, 3. Mod. 329. Saunderſon *v.* Rowles, 4. Burr. 2067. Buſcall *v.* Hogg, 3. Wilſ. 146. Patman *v.* Vaughan, 1. Term Rep. 572. Bartholomew *v.* Shergood, 1. Term Rep. 573. *Ex parte* Harriſon, 1. Brown C. R. 173. Watkins *v.* Cadell, Cook's B. L. 49. Parker *v.* Wells, 1. Brown C. R. 494. 1. Term Rep. 34. Cooke's Bank. Law, 3d edit. 46 to 85.

now

MAYHOE *againſt* ARCHER.

now no difficulty; and gave judgment for the plaintiff, without argument.

NOTE, This caſe was between two creditors of the bankrupt; for the ſtatute 21. *Jac.* c. 19. gives no precedency between the creditors of a bankrupt, though the debts are due to ſome upon recognizances or judgments, or other ſpecialties, and to others upon ſimple contracts; for it is enacted by that ſtatute, "that in "the diſtribution of the bankrupt's eſtate no more reſpect ſhall be "had to the debts upon judgments and ſpecialties, &c. than to "other debts."

*[50]

Caſe 32. * The King *againſt* The Inhabitants of St. Peter in the Eaſt, in the City of Oxford.

A ſervant who is hired for a year, though by a *boarder* in an *extraparochial place*, and goes with her miſtreſs into a pariſh on a *viſit* to a friend, for more than *forty days*, gains thereby a ſettlement in ſuch pariſh.—In an order of removal it is ſufficient to ſay, that the pauper had *intruded* into the pariſh.

2. C. 1. Stra. 524.
S. C. Foley, 272.
S. C. Sett. & Rem. 105. pl. 239.
S. C. 1. Burr. 312.

TWO JUSTICES removed *Mary Norris* from the pariſh of *St. Peter in the Eaſt*, in the city of *Oxford*, to the pariſh of *Fawley*, in the county of *Oxford*.

This order was diſcharged by the ſeſſions, upon appeal, it appearing, as it is ſtated in the order of ſeſſions, that the ſaid *Mary Norris* was hired at *Chriſt-Church*, in *Oxford*, an *extra-parochial place*, on the ſixteenth of *May* 1717, for one year, to *Mrs. Cooke*, who then lived, and ever ſince hath lived, with her ſon-in-law, *Doctor Clavering*, canon of *Chriſt-Church College* aforeſaid, as a ſojourner or boarder; and continued in her ſervice there until the month of ———, in the ſame year; when *Mrs. Cooke* went, upon a viſit, to her ſon's, *Mr. Freeman*'s, in the pariſh of *Fawley* aforeſaid, where ſhe continued three months upon the ſaid viſit; that her ſaid ſervant *Mary Norris* was with her at the ſaid *Mr. Freeman's*, and continued there in her ſervice all the three months; at the end of which the miſtreſs returned again to *Chriſt-Church* aforeſaid; that there the year's ſervice expired, ſhe having ſerved her miſtreſs the whole year, in purſuance of the firſt hiring (*a*); that afterwards, ſhe being poor, and likely to become chargeable, went into the pariſh of *St. Peter's*, *Oxford*; and from thence ſhe was removed, by the order of two juſtices, to the pariſh of *Fawley*, as having gained a lawful ſettlement there (as they apprehended) by the three months ſervice. Upon appeal, the ſeſſions diſcharged that order, being of opinion that ſhe gained a ſettlement in *Chriſt-Church*, that being the place where the ſervice determined. Both which orders being removed into the court of king's bench by *certiorari*,

IT WAS INSISTED, that the *ſeſſions order* might be quaſhed, and the *order of the two juſtices* confirmed.

(*a*) This ſtate of the caſe is taken from the Reports of Sir James Burrow, who tranſcribed it from the original record, 1. Burr. Rep. 312.

There

There were three queſtions:

THE KING *againſt*. THE INHABITANTS OF ST PETER IN THE EAST, IN THE CITY OF OXFORD.

FIRST, Whether a hiring in an *extraparochial place* will gain a ſettlement? If it do, then the hiring in *Chriſt-Church* and the ſervice for three months in *Fawley-Court* gain a ſettlement in *Fawley*. A ſervice in any pariſh for forty days in purſuance of a good hiring for a year, creates a ſettlement. The ſtatutes 3. & 4. *Will. & Mary*, c. 11. and 8. & 9. *Will.* 3. c. 30. which require a ſervice for a year, uſe the words "in *any* town or pariſh;" ſo that a perſon hired in any *extraparochial place*, which is neither a town or pariſh, is not within the words of the ſtatutes, for it is not to be preſumed that thoſe words would have been uſed, unleſs they were to bear ſome ſignification, and be of ſome effect, in the conſtruction of the ſtatute: the intent of the ſtatute in uſing thoſe words, and thereby excluding hirings in extraparochial places might be, that if a perſon who is inſufficient live as ſervant in any pariſh or town, he may be removed, and thereby the pariſh will prevent the ſervant's gaining any ſettlement; if a contrary conſtruction is made, a ſervant hired in (*a*) *Ireland* or *Scotland* coming over here and dwelling with his maſter will gain a ſettlement.

SECONDLY, Whether the miſtreſs's going on a viſit into *Fawley* is ſuch an inhabitancy as will gain a ſettlement for the ſervant, ſhe ſerving there forty days? Without doubt it would never intitle the miſtreſs to any ſettlement, for the words of the ſtatute 13. & 14. *Car.* 2. c. 12. are "coming to ſettle;" and if the law be ſo as to the miſtreſs, the reaſon equally holds as to the ſervant. The caſe of *mulier puiſne* coming to dine, &c. with *baſtard eigne* was compared to this. Co. Lit. 245. b.

THIRDLY, Whether the ſpecial order be ſufficient? not ſhewing that *Mary Norris* was in the pariſh of *St. Peter's* by intruſion; which it was inſiſted was neceſſary to give the two juſtices a juriſdiction of removing her.

HAWKINS, *Serjeant*, *è contra*.

FIRST, This hiring is a good hiring within the ſtatute 3. & 4. *Will. & Mary*, c. 11. and 8. & 9. *Will.* 3. c. 30. It is within the letter and words of them, for *Chriſt-Church* is ſaid to be in *Oxford*; ſo that *Oxford* muſt be taken to be a town, and *Chriſt-Church* a ſchool in *Oxford*; ſo that the hiring is in a town. But if *Chriſt-Church* be taken for an *extraparochial place*, yet it is within the intent and meaning of the acts; for the terms "town or pariſh" are only put for example (*b*), and not to exclude any other place wherein a ſervant may be hired. Beſides, theſe acts relating to the ſettlement of the poor have always received an equitable interpretation. If a ſervant hired in one pariſh, and having ſerved there half-a-year remove with his maſter into another pariſh, and ſerve there the reſt of the year, he will be ſettled in the ſecond

(*a*) EYRE, *Juſtice*, held, that if a man was hired in *Ireland* for a year, and after came within the year, and lived in *England* the laſt forty days with his maſter, that was ſufficient to gain a ſettlement. Foley, 274.

(*b*) Foley, 273.

THE KING *against* THE INHABITANTS OF ST. PETER IN THE EAST, IN THE CITY OF OXFORD.

parish, and yet he was never hired in such second parish, which seems to be required by the express words of the act; and the reason of such construction is, because the original contract obliges the servant to go wherever his master commands him; and he is in law hired into whatever parish he goes: so the words of 3. & 4. *Will. & Mary*, c. 11. are, "any unmarried person having no child "or children being hired for a year;" yet a widower having a child married is within the intent of the statute, though not within the words (*a*). The same exposition has been made in the certificate act, 9. & 10. *Will.* 3. c. 11. which has express negative words, "That such person shall by no act whatever, unless he "take a tenement of ten pounds *per annum*, or execute some "parochial office, gain a settlement:" yet a certificate person having a copyhold descended to her gained a settlement (*b*).

Forteſc. Rep. 309. Caſ. of Set. and Rem. 5. pl. 7. Fol 180 Stra. 163. Caſ of Set. and Rem. 90. pl. 121. 10. Mod. 430.

As to THE SECOND QUESTION: A servant going into a parish with his mistress will gain a settlement, though the mistress is only *a lodger* or *a visitor*, for the servant's settlement is independent of the mistress's, and not derivative from it, for the meritorious act which gains the settlement is the service, and that is performed by the servant. How far *a visitor* may gain a settlement for herself is not material in the present case; though such person may seem to be included in statute 13. & 14. *Car.* 2. c. 12. under the word "sojourner;" and by the old law "a visitor" was esteemed "an inhabitant," and obliged, as such, to find securities to the decennage (*c*). But in determining a servant's settlement, there is no necessity to enquire into the settlement of the master; for a servant living with a certificate person was settled, before 12. *Anne*, st. 1. c. 18. though the certificate person gained no settlement.

As to THE THIRD QUESTION: In the original order it is said, that the poor person *intruded* into the parish; it was lately adjudged, that an order of removal does necessarily imply, that the poor person was in the parish. "Endeavouring to settle" is not sufficient, without saying, "coming to settle;" because the one may be done without the other.

THE COURT held, that where a servant continues in the service of *a visitor* he gains a settlement (*d*); for he cannot be removed, unless the parish shew that he was brought or came thither on purpose that he might have a settlement; for the statute does indefinitely, and without any exception, appoint, that where the service is for forty days it shall gain a settlement; therefore it shall have a favourable construction in behalf of the poor. So if a woman be delivered of a bastard-child in such a parish, the birth gains a settlement, but not if she be sent thither on purpose for that end, or if her settlement be contested before she is delivered.

(*a*) See 2. Const's P. L. 317.

(*b*) See 2 vol. of Mr. Const's edition of Bott's Poor Laws, 681 to 697.

(*c*) Fort. 221. Foley, 274. and Burn's Observations on the Poor Laws, 107.

(*d*) See Alton *v.* Elvetham, Burr. S. C. 418. Rex *v.* East Ilsley, Burr. S. C. 722. Rex *v.* Bath Easton, Burr. S. C. 744.

Though

* Though the miſtreſs in this caſe was *a viſitor*, and no *lodger*, that does not alter the caſe, becauſe the ſervice was intirely independent of her. And as to the objection, that the ſtatute requires that the hiring ſhould be in a town or pariſh, and that this ſervant was hired neither in the one or the other, but in an extraparochial place, this is of no weight, for a ſervant may be ſaid to be hired in every pariſh where he ſerves, as well as a man who ſteals cattle in one county, and drives them into another county, may be ſaid to ſteal them in either county.

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Fol. 273.
Stra. 525.

The original order was confirmed, and the order of ſeſſions quaſhed *(a)*.

(a) The Court ſaid, that they could not take the ſettlement gained at *Fawley*, by a reſidence of forty days there, to be ſuperſeded by her ſubſequent return to *Chriſt-Church*, becauſe it was not ſtated that her laſt reſidence there was for *forty days*, S. C. Stra. 525. It appears by the caſe ſtated, that the pauper had reſided with her miſtreſs *forty days* in *Chriſt-Church* previous to her viſit to *Fawley-Court*, S. C. 1. Burr. 312. But where the laſt forty days are ſerved in a place where no ſettlement can be gained on account of its being extra-parochial, the ſettlement is in the place where the preceding forty days were ſerved, Rex *v.* Holborn, 2. Bott P. L. 483. And it is now ſettled, that if a ſervant or apprentice ſerve or inhabit forty days in one pariſh, and forty days in another pariſh, he gains a ſettlement in that pariſh in which he lodges the laſt day of the ſervitude, Rex *v.* Brighthelmſtone, 5. Term Rep. 188. Rex *v.* Undermilbeck, 5. Term Rep. 387.

Winnington *againſt* Briſcoe. Caſe 33.

If a perſon buy ſo much ſtock, and pay a certain ſum upon account, and before the *receipts* are iſſued an act of parliament ſuppreſſes the receipts, the purchaſer may recover his *advance-money* back again, in an action for money had and received to his uſe.

Palm. 364.
1. Salk. 27.
2. Burr. 1012.
1. Term Rep. 281. 732.
2. Term Rep. 366.
3. Term Rep. 125. 127.
Espinaſſ. 3.

THE PLAINTIFF bought a thouſand pounds *South-Sea ſtock* of the defendant, on the tenth day of *Auguſt* 1720, for which he, the plaintiff, agreed to pay eleven thouſand two hundred and fifty pounds, and had paid three thouſand pounds, part of the money; and the defendant promiſed to give him, the plaintiff, *receipts* for the ſaid thouſand pounds ſtock, as ſoon as the books of the Company were open. But before they were opened an act of parliament was made, prohibiting any more *receipts* to be given out, &c. whereupon the plaintiff brought his action againſt the defendant for the three thouſand pounds he had paid to the defendant as ſo much money had and received to his, the plaintiff's, uſe.

The queſtion was, Whether the failure to deliver the *receipts* ſhould ſubject the defendant to this action, or whether the defendant himſelf might not have an action againſt the now plaintiff for the remaining eight thouſand two hundred and fifty pounds.

THE COURT was of opinion, that *the receipts* being no part of the conſideration, but only an evidence of the agreement between the parties, which agreement being impoſſible to be performed by an act of parliament intervening, ſhall prejudice neither party; and the ſubſcription itſelf, which the defendant is ſtill ready to give, is but an evidence likewiſe of the agreement; but the credit he has is the ſubſtance.

Caſe 34.

Maſon *againſt* Buſhel.

If a *trader* be ſued by the addition of "*yeoman*," he cannot plead in abatement that he is "*a horner*."

THE PLAINTIFF brought an action againſt *Aaron Buſhel*, late of *Honiton*, &c. "yeoman."

The defendant pleaded in abatement, that he was "a horner," ABSQUE HOC that he was a yeoman.

Upon a demurrer to this plea it was argued, that "yeoman" is a good addition within the ſtatute * 1. *Hen.* 5. c. 5. by which it is enacted, "That in original writs where an *exigent* ſhall be awarded, "the addition of the defendant's condition and dwelling ſhall be "inſerted." Now here there was the addition of "yeoman," which the defendant muſt be if he is not "a gentleman," and "a horner" may be "a yeoman," *i. e.* an ordinary or common perſon; and if ſo, then the plaintiff has election to name the defendant, either by his degree or condition, or by his myſtery or trade; and this being a plea in abatement, the defendant ought to have given the plaintiff a better writ, and that directly in the ſame ſpecies of addition, and oppoſite to the addition of "yeoman," which he ſhould have pleaded.

S. C. cited 2. Ld. Ray. 1541. S. P. Stra. 556. 2. Inſt. 668. 1. Com. Dig. "Abatement" (F. 26.).

THE COURT was of opinion, that the defendant ought to have given the plaintiff a better writ in the ſame ſpecies of addition (*a*), otherwiſe he would take away the plaintiff's election of addition of his degree or myſtery, for "a horner" and "a yeoman" are not inconſiſtent.

Therefore the plea was adjudged ill, and the defendant ruled to anſwer over (*b*).

(*a*) This was ſaid by EYRE, *Juſtice*; but PRATT, *Chief Juſtice*, doubted, whether it was neceſſary to be of the ſame ſpecies.—NOTE *to former edition.*

(*b*) See Horſepoole *v.* Harriſon, 1. Stra. 556. determined on the authority of this caſe. Same point Smith *v.* Maſon, 2 Ld. Ray. 1541. 2. Stra. 816.—See alſo Warner *v.* Irby, 2. Ld. Ray. 1178.

Caſe 35.

Phillybrown *againſt* Reyland.

An action lies againſt a *veſtry-clerk* for keeping a pariſhioner out of veſtry.

S. C. poſt. 351.

S. C. 1. Stra. 624.

S. C. 2. Ld. Ray. 1388.

Eſp. Dig. 650.

AN ACTION ON THE CASE was brought by the plaintiff as a pariſhioner of the pariſh of *C.* againſt the defendant, being the clerk of the veſtry there, for ſhutting the veſtry door, and keeping the plaintiff out of the room, ſo that he could not come in to vote, &c.

And on a demurrer to the declaration,

IT WAS INSISTED *for the defendant*, that an action would not lie in this caſe; for if it ſhould, then every pariſhioner who was kept out might have the like action; therefore to avoid multiplicity of ſuits (*a*), this will not lie againſt the defendant, unleſs he had ſet forth ſome particular damage done to him.

Adjournatur (*b*).

(*a*) 5. Co. 72. 1. Salk. 12. 15.

(*b*) The Court were of opinion, that the action was maintainable, S. C. Stra. 624. S. C. poſt. 351.; but judgment was given for the defendant on an informality in the declaration.—See S. C. poſt. 351. S. C. Ld. Ray. 1388.

Sheers

Sheers *againſt* Lammas. Caſe 36.

REPLEVIN. The defendant avowed, that *T. S.* being ſeiſed in fee of the place WHERE, &c. made a (*a*) leaſe thereof to the plaintiff, *habendum* for nineteen years from * *Michaelmas*, *&c.* rendering rent, &c. and afterwards deviſed the lands to the defendant and his heirs, and died. Then he ſets forth, that the plaintiff in replevin *virtute dimiſſionis prædict.* (*b*) *intravit* (but did not ſay on what day) *et fuit inde poſſeſſionatus*, and that ſo much rent was due on ſuch a day, and being in arrear he diſtrained, &c. and ſo juſtified the taking; and there was a demurrer to this avowry.

Quære, Whether an avowry under a leaſe for years, ſtating its commencement *from* the *Michaelmas* preceding, and that the plaintiff, "*by virtue of the* "*demiſe afore-*"*ſaid, entered*, "*&c.* on the "feaſt of *St. Mi-*"*chael* afore-"ſaid," be good.

IT WAS OBJECTED, that the entry was laid too general; for it ought to be, "*virtute cujus quidem dimiſſionis*" the plaintiff in replevin "*intravit*" on ſuch a day, "*et fuit inde poſſeſſionatus*;" becauſe unleſs the particular day of his entry be ſet forth, he might enter before the leaſe commenced, and then he could be no *termor*, but a *diſſeiſor*; and in ſuch caſe the avowry ought to have been for *a treſpaſs*, and not for *rent*; for wherever an action of debt is brought for rent reſerved on a leaſe for years, or where a juſtification is made for rent arrear on a leaſe, it muſt be ſpecially ſhewed, that the perſon from whom the rent is due entered on the day the leaſe commenced.

But ON THE OTHER SIDE *it was inſiſted*, that the allegation in this avowry is ſufficient to ſhew, that the entry was before the diſtreſs taken.

THE COURT. It is true, there is no particular day ſet forth in this avowry when the plaintiff entered; but yet theſe words, "*virtute cujus quidem dimiſſionis intravit et fuit inde poſſeſſionatus*," muſt be intended of a legal entry by virtue of the demiſe; but admitting that he had actually entered before the commencement of the term, yet theſe words, "*et fuit inde poſſeſſionatus*," ſhall be taken to continue the poſſeſſion afterwards. My *Lord Coke*, in his Commentary on *Littleton*, has a parallel caſe, *viz.* "If tenant for "life in remainder diſſeiſe the tenant in poſſeſſion, he hath gained a "fee by ſuch diſſeiſin; but by the death of the diſſeiſee, that "wrongful fee is turned into a rightful eſtate for life by operation "of law." So in the principal caſe, the continuance of the poſſeſſion by the plaintiff ſhall be intended by virtue of the leaſe, by which he might defend himſelf in an action of treſpaſs or ejectment brought by the leſſor.

(*a*) It was made ſubſequent to the demiſe, and the main point upon the firſt argument aroſe upon its being ſo, *viz.* whether it was a total revocation of the deviſe during the leaſe, ſo as nothing ſhould paſs; or only a revocation *quoad* the term as to the poſſeſſion only, ſo that the reverſion and rent ſhould, notwithſtanding, paſs; and the Court held the latter.—NOTE *to former edition.*

(*b*) The leaſe was ſet forth to commence from *Michaelmas*, and the entry to be *ad feſtum Sancti Michaelis virtute dimiſſionis intravit*; ſo that it appeared to be a diſſeiſin.—NOTE *to former edition.*

SHEERS *againſt* LAMMAS.

But THE COURT being not clear in opinion, no judgment was given (*a*).

But the following, being a parallel caſe, was adjudged in *Michaelmas Term* following.

(*a*) See Pope *v.* Skinner, Hob. 72. *v.* Taylor, Cro. Jac. 684. Evans *v.* Niſhart *v.* Caſſon, Hob. 128. Rutter *v.* Mills, Cro. Jac. 662. Brookſbank Crocker, 3. Mod. 198.

*[54]

Caſe 37.

* Macdonel *againſt* Weldon.

Hilary Term, 9. *Geo.* 1. *Roll* 273.

AN ACTION OF REPLEVIN was brought in the court of common pleas.

AN AVOWRY for rent, under a leaſe dated 24 June, HABENDUM *from* the ſaid 24 *June*, *virtute cujus* the plaintiff entered *on* the ſaid 24 *June*. is good; for although the word "*from*" is excluſive, and therefore he could not legally enter *on* the day ſtated, and ſo he was a *diſſeiſor*, and not a *leſſee*, yet a tortious entry does not diſcharge the contract for the payment of the rent.

The defendant avowed, for that *T. S.* being ſeiſed of the place WHERE, &c. in fee, demiſed the ſame to the plaintiff for the term of one year, and from thence from quarter to quarter, *quamdiu ambabus partibus placuerit*, each party giving a quarter's warning, to commence from the feaſt of *St. John Baptiſt*, *&c.* rendering rent; that *J. N.* was ſeiſed in fee, and on the thirtieth day of *September* 1717 demiſed to the avowant; who, on the twenty-firſt day of *April* 1718, demiſed to the plaintiff a ſhop, &c. parcel of the premiſes; and that the plaintiff *virtute dimiſſionis prædict. intravit et fuit inde poſſeſſionatus in et à prædicto feſto Sancti Johannis*, *&c.*; and that the rent being in arrear at ſuch a time, he, the defendant, diſtrained; and ſo juſtified the taking.

The plaintiff in his bar to the avowry pleaded, that *A. B.* was ſeiſed in fee, ABSQUE HOC *quod prædictus* T. S. *fuit ſeiſitus*, *&c.*

The avowant tendered an iſſue upon that traverſe.

The plaintiff demurred.

S. C. 1. Stra. 550. 8. Co. 147. Eſp. Dig. 357.

Judgment was given in the court of common pleas for the avowant.

A WRIT OF ERROR was brought on this judgment in the court of king's bench.

IT WAS ARGUED, that where a leaſe is made to commence *from* a day to come, the day itſelf is always excluſive (*a*); and if the leſſee enter before the commencement of the leaſe, he is *a diſſeiſor*, and no leſſee, ſo no rent due on this demiſe. Neither can his continuing in poſſeſſion after the commencement of the leaſe tranſpoſe it to be an eſtate for years, and purge the *diſſeiſin*, becauſe the firſt entry was by wrong; like an ejectment, where, if it appear that the entry was before the commencement of the leaſe, the defendant can never be poſſeſſed by virtue of that leaſe; and in this caſe the

(*a*) See Powell on Powers, p. 435 to 526. where all the caſes on this ſubject are collected.

avowant

avowant ſhews, that the leſſee is a diſſeiſor, and the contract between him and the leſſor is not ſufficient to maintain an action at law; this is not laid as a demiſe at will.

EYRE, *Juſtice*, ſaid, "*virtute cujus dimiſſionis intravit*" is proper and ſufficient, without ſhewing the particular day of entry; and if ſo, the entry being ſubſequent to the commencement of the term, will veſt in the leſſee the poſſeſſion from the time of the commencement.

ON THE OTHER SIDE it was admitted, that the caſes cited in the (*a*) margin are law; but there is a difference where the leſſee enters with the conſent of the leſſor before the commencement of the leaſe, and where he enters without ſuch conſent; for in the laſt caſe, the leſſee is a diſſeiſor by the wrong done to the leſſor; but where the leſſee enters with the conſent of the leſſor, there no wrong is done. It is true, he cannot demand any rent due before the commencement of the term; but yet by his continuing in poſſeſſion, by the conſent of the leſſor, who has the right, the leſſor may have an action for the rent arrear. The entry does not appear to be before the term commenced. There is no time to the *intravit*; for *in et à prædicto feſto* can refer only to the words *habuit poſſeſſionem*. Beſides, it is averred that he entered *virtute dimiſſionis*. Every quarter amounts to a new demiſe, it being a leaſe certain for a year, and then a due leaſe at will; and the avowry is not for rent during the year, but for a year ſubſequent to the expiration thereof. This diſpute is only between the leſſor and leſſee; ſo that the contract ought to be aſſiſted as far as poſſible.

THE COURT held there was a difference between *an ejectment*, wherein the plaintiff is to recover his term, and *an avowry* for rent; for in the one caſe the plaintiff muſt truly make out his title, but ſo much ſtrictneſs is not required in the other. Beſides, no act of the leſſee ſhall hurt or impeach the contract between him and the leſſor, nor ſhall the leſſee's * entry before the commencement of the leaſe diſcharge the rent (*b*); but he ſhall ſtill be liable to an action of debt for the rent arrear. * [55]

FORTESCUE, *Juſtice*. As to the point of law, I am of opinion, that the avowry is ſufficient. Every *diſſeiſin* is a treſpaſs, but every treſpaſs is not a diſſeiſin. A *diſſeiſin* is when one enters intending to uſurp the poſſeſſion, and to ouſt another of the freehold: therefore *querend. eſt à judice quo animo* he entered. And it is at the election of him to whom the wrong is done if he will allow it to be a diſſeiſin, as appears by the caſe of *Blundell v. Baugh* (*c*), which is a very good caſe. To make an entry *a diſſeiſin* there muſt be an *ouſter* of the freehold; either, firſt, by taking the profits; or, ſecondly, by claiming the inheritance. In

(*a*) Dyer, 89. 109. 2. Roll. Abr. 420. Cro. Eliz. 766. 1. Sid. 8.

(*b*) Cro. Eliz. 905. 1. Roll. Abr. 605.

(*c*) Cro. Car. 302.—See alſo Doe on the Demiſe of Atkins v. Horde, 1. Burr. 60. Cowp. 689.

MACDONEL *againſt* WELDON.

this caſe the entry of the leſſee ſhall be intended only to claim his *intereſſe termini*; but if he had claimed the inheritance, it can be no *diſſeiſin invitis partibus*. Here appears no intention of either party to make it *a diſſeiſin*, and conſequently it is none. An *ejectione firmæ* differs, for there a title muſt be ſhewn, and a title to that term of which he is ejected, and which he is to recover. And beſides, no continuance in poſſeſſion is there alledged. It will be a hard conſtruction to defeat the contract becauſe the leſſee entered a day too ſoon. And in this caſe, the leſſee did not only enter before the day, but continued in poſſeſſion after the day the leaſe commenced; and that by the conſent of the leſſor himſelf; ſo it ſhall be in his election to take the leſſee for a diſſeiſor by his tortious entry; but by no means to be a diſſeiſor when he continued in poſſeſſion by the conſent of the leſſor,

Cro. Jac. 684. Cro. Car. 302. 434 Lev. 270. Salk. 245.

So this avowry was held good; and the judgment was affirmed by THE WHOLE COURT.

Caſe 38. The King *againſt* Bowen Hart, the Mayor, and Burgeſſes of Malmſbury.

Saturday, 5 *May* 1722.

If a burgeſs, on his admiſſion, take the oaths of abjuration and ſupremacy, but unintentionally, and through the default of the town-clerk, omit to take the other oaths required by law, the Court, after an interval of eight years, will not grant an information *quo warranto* againſt the burgeſs, on the application of the town-clerk.

A MOTION was made for leave to file AN INFORMATION againſt the defendants, upon an affidavit of the town-clerk of *Malmſbury*, for that one *Gawen Hart*, of the ſaid borough of *Malmſbury*, was admitted to be a capital burgeſs thereof in the year 1714, and had not taken the oaths of *abjuration* and *ſupremacy* when he was admitted.

A rule was made for the defendants to ſhew cauſe why an information in the nature of a *quo warranto* ſhould not be filed.

And now the defendants produced ſeveral affidavits, by which it appeared, that the ſaid *Hart* did take all the oaths which were *tendered* to him at the time he was admitted a capital burgeſs; and alſo that he took the oaths of *abjuration* and *ſupremacy* ſome ſhort time afterwards, at a quarter-ſeſſions held in *Wiltſhire*; and he himſelf made affidavit, that he believed he had taken all the oaths requiſite for him to take at the time of the election.

IT WAS URGED *for the defendant*, that it plainly appears that he had not neglected to take the oaths out of any diſaffection to the Government, but merely becauſe they were not tendered to him by THE TOWN-CLERK at the time when he was choſen capital burgeſs, he, the town-clerk, being the proper perſon to tender the ſame, and who ſhall be intended to know the penalty in not taking them. And though, in rigour of law, his not taking the oaths made his election void; yet ſince it was merely through the neglect of the town-clerk, and who had now acquieſced without

any

THE KING *againſt* BOWEN HART, THE MAYOR, AND BURGESSES OF MALMSBURY.

any manner of proſecution for above *eight years* (*a*), therefore this burgeſs ought not to be damnified, eſpecially ſince this proſecution ſeems to be carried on at the inſtance of a great perſon, who offered *Hart*'s wife a thouſand guineas the night before the day of the laſt election of members to ſerve in parliament, to perſuade her huſband to give his vote and intereſt to a perſon who then ſtood candidate to be choſen a repreſentative for the ſaid borough, which ſhe refuſed, as appears by her own affidavit; and therefore this town-clerk was put on to proſecute the huſband.

ON THE OTHER SIDE *it was ſaid*, that the queſtion is not concerning the miſbehaviour of the town-clerk, but whether this *Hart* was duly choſen a capital burgeſs; and it ſeems very plain, that he was not, becauſe the ſtatute requires that he ſhould take the ſaid oaths, otherwiſe his election is void; and if ſo, it cannot now be made good. Neither will length of time, or any pretended ignorance of the ſtatute enable a perſon to officiate contrary to the expreſs words of the act itſelf; for if he is an uſurper, the long continuance in his office will not ſhelter him from an information, becauſe it is poſitively required by the ſtatute, that he ſhall take the oaths before he is admitted to the office.

PRATT, *Chief Juſtice*. If he did not take the oaths at the time of his admiſſion to be a capital burgeſs, he is not qualified to be a burgeſs, and the length of time wherein he continued to be ſo will not obſtruct the filing an information againſt him, but then after ſo long a time there ought to be a clear proof of his wilful refuſal or voluntary neglect to take the oaths; but certainly an information ought not to be granted upon the oath of THE TOWN-CLERK himſelf, becauſe it was his fault that this *Hart* did not take the oaths; and it was likewiſe his duty to diſcover the not taking them, which he had not done for ſo many years together; therefore length of time ſhall gain a preſumption in his favour, eſpecially when, by other affidavits, it is proved, that he took all the oaths he believed to be requiſite for him to take at the time of his election. If the crown pleaſe, an information may be filed in the name of THE ATTORNEY-GENERAL, but we cannot file any but upon probable cauſe, and none appearing here, the rule muſt be diſcharged.

POWYS, *Juſtice*, was of the ſame opinion.

EYRE, *Juſtice*, of the ſame opinion.

FORTESCUE, *Juſtice*. The probability of the evidence is ſo much on the defendant's ſide, that if I were to be a juror in this cauſe I ſhould acquit him. In the caſe of *The Queen v. Jefferies* (*b*), concerning the borough of *Bridgwater*, he took the oath

(*a*) By 32. *Geo.* 3. c. 58. to any information *quo warranto* the defendant may plead in bar, that he has held the office or franchiſe for *ſix years* preceding the information.

(*b*)

of

THE KING *againſt* BOWEN HART, THE MAYOR, AND BURGESSES OF MALMSBURY.

of allegiance three days after his admiſſion, for which an information was prayed, but denied; and he was never re-elected. After *eight years*, we ought not to put the defendant to a trial to prove that he took the oath of allegiance at a proper time. It has been held, that no tender of the oaths is neceſſary, contrary to 2. *Lee.* 242, 243.

So the information was not granted, but the rule was diſcharged *(a)*.

(a) See Rex v. Williams, 1. Stra. 677. Rex v. Newling, 3. Term Rep. 310. Rex v. Smith, 3. Term Rep. 573.

* [57]

Caſe 39.

Abdelard *againſt* ———.

On an agreement to pay 50l. at 5l. a-year, and on failure to pay any 5l. then to pay the whole; an action lies for the 50l. on neglecting to pay any inſtalment on the time appointed for the payment of it.

Co. Lit. 292.
3. Co. 22.
5. Co. 52.
Cro. Jac. 504.
Cro. Eliz. 118.
Dyer, 113.
Jenk. 333.
Cro. Car. 350.
Moor, 13.
2. Ter. Rep. 100.
1. Wilſ. 80.
1. Com. Dig. "Action" (F.).

A MAN by marriage articles was to pay fifty pounds, at five pounds a-year, until the whole fifty pounds ſhould be paid, and in failure of payment of any five pounds, then he was to pay the whole.

* The queſtion was, Whether, upon failure of payment of one five pounds, an action could be maintained for what was then due.

IT WAS ARGUED, that it could not until all the days of payment were paſt. Beſides, the ſtatute 4. & 5. *Anne*, c. . for amending the law, gives the Judges power, upon payment of principal, intereſt, and coſts, to diſcharge a man after judgment obtained againſt him for a penalty; and this ſhall be deemed an equitable penalty.

THE COURT. The power given to the Court by the ſtatute is to ſtay all proceedings on payment of all that is due; and in the principal caſe all the fifty pounds is due, and no part of it is a penalty. The defendant, by the condition of theſe articles, had only time for the payment of the money by parcels, as therein directed, the benefit of which condition is now loſt by his breach thereof.

So the plaintiff had judgment *(a)*.

(a) But this ſeems to apply only to actions of *aſſumpſit*, Beckwith v. Nott, Cro. Jac. 504. Peck v. Ambler, Cro. Car. 350. Peck v. Redman, Dyer, 113. Taylor v. Foſter, Cro. Eliz. 807. Cooke v. Whitewood, 2. Saund. 164.; for in the caſe of Rudder v. Price, C. B. Hilary Term, 31. *Geo.* 3. it is decided, that an action of *debt* will not lie on a promiſſory note payable by inſtalments, until the laſt day of payment be paſt, 1. H. Bl. Rep. 547.—See alſo Counteſs of Plymouth v. Throgmorton, 3. Mod. 153.

MICHAELMAS TERM,

The Ninth of George the Firſt,

IN

The King's Bench.

Sir John Pratt, *Knt. Chief Juſtice.*

Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.*
Sir John Forteſcue Aland, *Knt.* } *Juſtices.*

Sir Robert Raymond, *Knt. Attorney General.*

Sir Philip Yorke, *Knt. Solicitor General.*

Coleborne *againſt* Stockdale.

Caſe 40.

DEBT ON A BOND. The defendant, upon *oyer*, pleaded in bar, that the bond was given for money *won at play*. The plaintiff replied, that it was not given for money won at play. The defendant demurred to the replication.

In debt on bond, if the defendant plead that it was given for money won at play, A REPLICATION generally, that it was not given for money won at play, is bad.

S. C. 1. Stra. 493. Cro. Eliz. 404. Ld. Ray. 1550. 5. Com. Dig. "Pleader" (F. 6.). (G. 12.).

IT WAS INSISTED *for the defendant*, that the replication was ill, becauſe the plaintiff did not ſet forth, that the money, *or any part thereof*, was not won at play; for by the ſtatute 9. *Anne*, c. 14. * it is enacted, "That all ſecurities, where the whole *or any part* of the "conſideration is for money won at play, ſhall be void;" ſo that it is not ſufficient for the plaintiff to alledge, that the money for which the bond was given was not won at play, but he muſt likewiſe add, "nor *any part thereof*;" for if any part is for gaming money, the entire ſpecialty is avoided by the ſtatute.

E contra. Where the plaintiff has any manner of right, he may alledge it to ſupport his action; and where the defendant pleads but one fact, there can be but one reply.

THE

COLEBORNE *againſt* STOCKDALE.

THE COURT was of opinion, that the replication was too large and uncertain; therefore gave judgment for the defendant (*a*).

(*a*) The bond was conditioned for the payment of 1500l.; the defendant pleaded, that part of the ſum mentioned in the condition, *ſcilicet* 1500l. was won by gaming, contrary to the ſtatute, by which the bond became void; the plaintiff replied, that the bond was given for a juſt debt, and traverſed that the 1500l. was won by gaming, *modo et forma*, &c.; and, on demurrer, it was objected, that the replication was ill, becauſe it made the ſum parcel of the iſſue, and obliged the defendant to prove, that the whole ſum of 1500l. was won by gaming, whereas the ſtatute avoids the bond if any part of the conſideration be on that account; and THE COURT was of opinion, that there was no colour to maintain the replication, for that the material part of the plea was, that part of the money for which the bond was given was won by gaming, and that the "*ſcilicet* 1500*l.*" was only form, of which the replication ought not to have taken any notice: but judgment was given for the plaintiff, on an exception to the defendant's plea. S. C. Stra. 493. 498. —See alſo Fagg v. Fagg, Mich. Term, 1742.

Caſe 41.

The King *againſt* Gibbs.

An indictment for ſelling beer without having paid the duty, is good, although it does not ſay to whom ſold.

S. C. 1. Stra. 497.
S. C. Seſſ. Caſ. 263.
Andr. 175.

THE DEFENDANT was indicted for ſelling beer without paying the duty, and, upon *not guilty* pleaded, the cauſe was tried, and he was found guilty.

IT WAS NOW MOVED *in arreſt of judgment*, that this indictment was inſufficient, becauſe it ſet forth, that the defendant ſold beer without paying the duty; but did not ſhew to whom, or at what time it was to be paid, nor what quantity of beer he ſold, and conſequently a conviction upon ſuch an uncertain indictment cannot be pleaded to any other for the ſame offence; neither can the defendant make any tolerable defence to ſuch an uncertain charge (*a*).

An indictment for ſelling *divers quantities* of beer is too general.

2. Lev. 39.
4. Mod. 100.
Cro. Car. 380.
2. Rol. Abr. 80.

SECONDLY, In criminal caſes the utmoſt certainty is required; therefore the quantity of the offence ſhould have been ſet forth in this indictment, ſo as a conviction thereon might have been a bar to all other actions and proſecutions for the ſame offence.

And for this reaſon the judgment was arreſted.

(*a*) THE COURT, as to this point, held the indictment good; for the proſecutor may not know the name of the perſon to whom the beer is ſold, and it is an offence, let it be ſold to whom it may. S. C. 1. Stra. 497.

Caſe 42.

The King *againſt* Sparling.

A conviction for curſing and ſwearing on the 6. & 7 *Will.* 3. c. 11. muſt not only ſet forth the oaths and curſes, but ſhew that the defendant is not any of the other characters mentioned in the act. —S. C. Stra. 497. Seſſ. Caſ. 263.

INFORMATION upon the ſtatute 6. & 7. *Will.* c. 11. (*a*), made againſt prophane curſing and ſwearing, by which the

(*a*) This ſtatute is repealed by 19. *Geo.* 2. c. 21 which enacts, "That if any perſon "ſhall profanely curſe or ſwear, and be "thereof convicted on the oath of one "or witneſs, before any magiſtrate, he ſhall "forfeit and loſe, *viz.* a day-labourer, "common ſoldier, common ſailor, and "common ſeaman, *one ſhilling*; every "other perſon, under the degree of a "gentleman, *two ſhillings*; and every "perſon of or above the degree of a gentleman, *five ſhillings*, &c."

offender

offender forfeits two ſhillings for every oath (other than a ſervant, labourer, common ſoldier or ſailor).

THE KING *againſt* SPARLING.

Upon not guilty pleaded, there was a verdict for the proſecutor.

IT WAS MOVED *in arreſt of judgment*,

FIRST, That this information was too wide and uncertain, becauſe it did not ſet forth, that the defendant was not a ſervant, common labourer, common ſoldier, or common ſailor; for this * being in a criminal caſe, it ſhall be intended that he was one of thoſe perſons, if it do not appear that he was not; therefore that matter ought to have been ſpecially ſet forth (*a*); like the caſe where the defendant pleads a pardon, he muſt ſhew, that he is a perſon not within either or any of the exceptions (*b*).

* [59]

SECONDLY, That the oaths ought to have been ſpecified in the information, that the Court may judge of the nature of them; for otherwiſe the informer makes himſelf a judge of the fact, and that in his own cauſe, which ſhall never be allowed (*c*).

IT WAS ARGUED *on the other ſide*, that this information was good, for if the defendant was either a ſervant, labourer, common ſailor, or ſoldier, he ought to have pleaded it, or to have given it in evidence at the trial.

But, for the reaſons above-mentioned, the *conviction* was quaſhed.

(*a*) See Andr. 175. 2. Ld. Ray. 1368. 1. Burr. Rep. 150. 2. Burr. 1036.— But this queſtion cannot now ariſe, for the 19. *Geo.* 2. c. 21. preſcribes the form in which the conviction ſhall be drawn.

(*b*) Ante, 45. 4. Hawk. P. C. ch. 37. ſ. 60.

(*c*) See Rex *v.* Chaveney, 2. Ld. Ray. 1368. Rex *v.* Popplewell, 1. Stra. 686. Rex *v.* Roberts, 1376.

MICHAELMAS TERM,

The Ninth of George the Firſt,

ON

A Trial at Bar,

IN

The Court of King's Bench.

Sir John Pratt, *Knt. Chief Juſtice.*
Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Juſtices.*
Sir John Forteſcue Aland, *Knt.*

Burr *againſt* Davall.

Caſe 43.

A will, well executed, ſhall not be ſet aſide, or the teſtator conſidered *non compos mentis*, on account of the diſpoſitions therein being imprudent or unaccountable.

6. Co. 23. Moor, 760. Dyer, 72. Stiles, 427. 3. Caſ. Ch. 103. 2. Com. Dig. "Chancery" (3. A. 1.).

ON the trial of an iſſue out of chancery, on the validity of *Sir Thomas Davall*'s will, tried at the bar of the court of king's bench, the caſe was thus:

Sir Thomas Davall had two ſons, and being taken ill on the fifteenth day of *April* 1719, he made his will about four days afterwards, and deviſed his eſtate in *Eſſex*, being about ſixteen hundred pounds a-year, to his eldeſt ſon, and the heirs of his body, and his *Middleſex eſtate*, being about ſeventeen hundred pounds a-year, to his youngeſt ſon, and to the heirs of his body; and that if either of his ſaid ſons died *without iſſue*, then the eſtate of him ſo dying ſhould remain and go to the ſurvivor; and if both his ſaid ſons ſhould die *with iſſue*, then he deviſed the whole eſtate to *Daniel Burr* (the leſſor of the plaintiff) and his heirs. Both the ſons died without iſſue, and *Lady Davall*, the widow of the teſtator, and who was his heir at law (*a*), endeavoured to ſet aſide this will.

(*a*) *Lady Davall* was the teſtator's widow, but not his heir at law; and was not at all concerned in the cauſe: indeed ſhe was daughter to *Lydia Vanhattem*, niece to the two *Mrs. Davalls*, and firſt-couſin to *Mrs. Bovey*; but ſhe had a brother living, *Mr. John Vanhattem*. The teſtator's heirs at law were the ſaid *Lydia Vanhattem*, *Elizabeth Davall*, *Mary Davall*, and the ſaid *Catherine Bovey*.—NOTE *to former edition.*

The

Burr *againſt* Davall.

The queſtion was, Whether *Sir Thomas*, the teſtator, was *compos mentis* at the time he made this will.

To ſhew that he was not, IT WAS ARGUED, that a father in his ſenſes would not have left his youngeſt ſon a greater eſtate than he left to his eldeſt, who had only his *Eſſex* eſtate, and by articles in marriage he was bound to leave his younger children ten thouſand pounds out of that eſtate, and his lady ſix hundred pounds a-year jointure out of that very eſtate. Beſides, if the teſtator had been in his ſenſes, the words in his will would not have carried an eſtate to the leſſor of the plaintiff, for the deviſe was to his ſons, &c. and that if both die *with iſſue*, inſtead of *without iſſue*, then * to *Daniel Burr*; ſo that this being a condition precedent, the plaintiff can have no eſtate by this will. Neither ſhall the probate thereof by the executor add any ſtrength to it in this court, ſince the defendant was next heir at law to the teſtator at that very time; ſo it was held in the caſe of *Sir George Markham v. Lord Mountague* (*a*), where the will was proved by the heir at law; yet by the judgment of this Court, confirmed on a writ of error in the houſe of lords, it was avoided as to the real eſtate.

* [60]

E contrà. It is no objection to ſay, that the teſtator was not *compos mentis*, becauſe he did not diſpoſe his eſtate with that prudence another man might have done, for he himſelf is the proper judge why he deviſed it in that manner; and it is very probable, that in his laſt ſickneſs he did not remember out of which part of his eſtate his wife was to have her jointure; ſo that if this will ſhould be ſet aſide for the reaſon ſuggeſted by the defendant's Counſel, then there would be but little room left for a man in his laſt ſickneſs to make any ſettlement or proviſion for his family.

Words in a will muſt be taken in that ſenſe which is conſiſtent with reaſon.

Then if there ſhould be any doubt, whether the words in the will were "dying *with iſſue*," or "*without iſſue*," it ought to be taken in that ſenſe which makes the will conſiſtent with reaſon and good ſenſe.

An objection to a witneſs muſt ariſe from the *voir dire* on the ground of intereſt, or by proof of his incompetency.

At this trial THE COUNSEL *for the plaintiff* objected againſt a witneſs produced by the defendant to prove that the teſtator was *non compos mentis*, *viz.* that he was to get by the ſucceſs of this cauſe.

TO WHICH *it was anſwered*, that there were but two ways of excepting againſt a witneſs, either as to his oath, or by proving that he was a diſabled perſon; and this muſt be done on the other ſide.

The jury found for the plaintiff.

(*a*)

MICHAELMAS TERM,

The Ninth of George the First,

IN

The King's Bench.

Sir John Pratt, *Knt. Chief Juſtice.*
Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Juſtices.*
Sir John Forteſcue Aland, *Knt.*
Sir Robert Raymond, *Knt. Attorney General.*
Sir Philip Yorke, *Knt. Solicitor General.*

The King *againſt* The Inhabitants of St. Peter's, Oxford. Caſe 44.

If a coachmaſter live in the pariſh of *A.* and keep horſes in the pariſh of *B.* and hires a ſervant for a year in the pariſh of *A.* who lives during the whole time in ſuch ſervice in the pariſh of *B.* he gains a ſettlement in *B.* where *the ſervice* is performed, and not in *A.* where he was hired, and his maſter lived.—S. C. 1. Stra. 528. S. C. Sett. & Rem. 103. S. C. Fol. 215.

ONE *Diſney* was hired in the pariſh of *St. Peter's*, in *Oxford*, by *Stonell*, who kept a ſtable of horſes at *Chipping-Wickham*, for the *London* road. *Diſney* ſerved at *Chipping-Wickham* a whole year, and not in the pariſh of *St. Peter's*, where he was hired. Afterwards, being likely to be chargeable, he was removed, by an order of two juſtices, to the pariſh of * *St. Peter's*, where he was hired, and where his maſter lived; which order was confirmed upon an appeal.

Upon a *certiorari* to remove the ſaid orders,

IT WAS MOVED, that they ſhould be quaſhed, becauſe it appeared, by the original order, that this man was ſettled at *Chipping-Wickham*, for there he ſerved a whole year; and though the hiring was in *St. Peter's* pariſh, yet it is not *the hiring*, but *the ſervice*, which makes the ſettlement. Forteſc. Rep. 318. Fol. 277. S. P. accord. in 2. Sef. Caſ. 137. pl. 125.

IT WAS INSISTED *on the other ſide*, that it is more reaſonable the ſettlement of the ſervant ſhould be where his maſter lives than elſewhere, becauſe the maſter might ſettle his ſervant in any pariſh where he pleaſed, though he did not live there himſelf. Forteſc. Rep. 308. Ld Raym. 683. Caſ. of Sett. and Rem. 16. pl. 23.

THE KING *againſt* THE INHABITANTS OF ST. PETER'S OXFORD.

THE COURT was of opinion, that this man was ſettled at *Chipping-Wickham*, for it is *the ſervice*, and not *the hiring*, which makes the ſettlement. This is a common caſe; for if a man have lands in two pariſhes, and keep houſe and live in one pariſh, and have a ſtock of cattle in another pariſh, and ſervants there to look after them, they ſhall be ſettled in the pariſh where they ſerve, and not in the pariſh where they were hired, and where their maſter lives.

So the ſeſſions order was quaſhed; and that of the two juſtices alſo (*a*).

(*a*) See Rex *v.* Spitalfields, poſt. 309. Biſhop's Hatfield *v.* St. Peter's, Stra. 794. 2. Bott P. L. 458. Rex *v.* Hemioak, Fort. 308. Rex *v.* Ladock, Burr. S. C. 179. Rex *v.* Croſcombe, Burr. S. C. 256. Rex *v.* St. Agnes, 2. Bott P. L. 469. Rex *v.* Eaſt Ilſley, Burr. S. C. 722. Rex *v.* Bath Eaſton, Burr. S. C. 744. Rex *v.* Nympsfield, Cald. 107.

Caſe 45. The King *againſt* Fairclough and Others, Inhabitants of Lambeth.

If *a rector* make a verbal leaſe of his tithes for a year, and *the leſſee* let the tithes to the reſpective *landholders* for ſixpence *per* acre more than he is to pay to the rector, the leſſee is the occupier of the tithes, and ſhall be charged thereon to the poor rate.

S. C. 1. Stra. 525. S. C. Forteſ. 318. S. C. Sett. & Rem. 106. S. C. Foley, 25.

THE RECTOR of the pariſh of *C.* by a verbal agreement, let his tithes to *Fairclough* and others, paying to him two ſhillings and ſixpence an acre for one year. *Fairclough* and the other farmers of the ſaid tithes let the ſame to the reſpective tenants of the lands, paying to them three ſhillings an acre for that year, excepting one tenant, from whom they received tithes in kind; and they paid to the rector two ſhillings and ſixpence an acre. *Fairclough* and the other farmers were afterwards charged by the churchwardens and overſeers of the poor of the ſaid pariſh of *C.* by a rate towards the maintaining the poor of the ſaid pariſh, upon the ſtatute 43. *Eliz.* c. 2. as occupiers of the tithes. Upon an appeal to the ſeſſions, they were diſcharged as to all excepting only ſeven ſhillings and ſixpence, which they were ordered to pay for the tithes of that tenant from whom they received the tithes in kind.

All this being removed into the court of king's bench by *certiorari*,

THE QUESTION was, Who ſhall be accounted the occupiers of thoſe tithes; *the farmers* who paid the rent to the rector, * or *the tenants* of the lands who paid their rent for the tithes to the farmers.

MR. REEVE argued, that *the farmers* were not to be charged as occupiers, they having let the tithes to *the tenants* of the lands; that it is a ſettled point, that the rector is not an occupier when he lets his tithes to farm; and the reaſon is the ſame, that the farmers ſhall not be occupiers when they let the tithes to the landholders; therefore they, and not the farmers, may properly be accounted the occupiers; for if the farmers had made an under-leaſe to *T. P.* who had by virtue thereof let the tithes to the landholders, they had been the occupiers of the tithes. True it is, that in ſtrictneſs

ſtrictneſs the landholders have not the tithes until they are ſevered from the nine parts, but they have the ſubſtance thereof, *viz.* the profits, and for that reaſon they ſhall be charged as occupiers; for *the farmers* have only a dry rent out of the tithes, which may be double that value to the landholders. The farmers never bought the tithes, but pay ſo much for them to the rector for a year, and the landholders pay ſo much to the farmers; therefore they may be charged at any time of the year by the pariſh-officers, for the right of the tithes is in them all the whole year, and not in the farmers.

WHITAKER, *Serjeant, on the other ſide*, argued, that the farmers ſhall be accounted the occupiers of thoſe tithes, in regard of the three ſhillings an acre paid to them by the landholders; and that it is impoſſible for the pariſh-officers to charge any other than the farmers as occupiers of the tithes, becauſe the landholders only purchaſe them at harveſt, and therefore are no more occupiers than ſtrangers, who may buy them at any time, if the landholders do not agree to purchaſe them; ſo that the farmers having got the value of the tithes, ſhall be accounted occupiers thereof; and the landholders cannot be charged with reſpect to the value of the tithes, becauſe the farmers have the value; therefore the landholders cannot be occupiers when the farmers receive the profits.

THE COURT was of that opinion, that *the farmers* ſhall be accounted *the occupiers* of thoſe tithes. It is true, it might be otherwiſe if an under-leaſe had been made thereof; but this is a particular caſe; and it appears by the rate, that the farmers have ſixpence an acre profit; and if the rate be aſſeſſed on the profits of the tithes, it ought to be aſſeſſed on them, becauſe it does not appear to the Court, that the landholders had any profit, for they may have a hard bargain. Therefore they ſhall rather be accounted *buyers* of thoſe tithes than *occupiers*; for where an agreement is made for * tithes, they ſhall paſs by way of bargain, otherwiſe they cannot paſs at all, becauſe they lie in grant; and therefore cannot otherwiſe paſs than by deed, for a verbal agreement for them is good only for a year (*a*). The money which the farmers receive of the landholders for thoſe tithes ſhall be accounted a *modus*; and wherever there is a *modus*, he who receives it ſhall be taken to be the occupier of the tithes (*b*). So where a man has a wood of ſtanding corn, and ſells the ſame ſtanding, the ſeller ſhall pay the tithes for that year (*c*). In this caſe, *the rector* who ſerves the cure for two ſhillings and ſixpence an acre ſhall not contribute to the poor's tax; but *the farmers*, who have ſuch a benefit of ſixpence an acre without any manner of conſideration for it, by raiſing ſo much on the landholders.

* [63]

(*a*) Hawkes *v.* Brayfield, Cro. Jac. 137.—But now by 5. *Geo.* 3. c. 17. "All "leaſes for one, two, or three life or lives, "or any term not exceeding twenty-one "years, made or granted, of any tithes, "tolls, or other incorporeal heredita- "ments, ſolely, and without any lands or "corporeal hereditaments, by any eccle- "ſiaſtical perſons enabled to make ſuch "leaſes of corporeal hereditaments, are "declared to be good againſt the leſſors "and their ſucceſſors."

(*b*)

(*c*)

THE KING *against* FAIRCLOUGH AND OTHERS, INHABITANTS OF LAMBETH.

PRATT, *Chief Juſtice.* I doubt that the farmer of the rector is to be eſteemed *primâ facie* occupier of theſe tithes: he retains the tithes, though he pays the value for them.

EYRE, *Juſtice.* The farmer is in this caſe the occupier, he having them by way of retainer, in purſuance of an agreement by parol. It would be otherwiſe if there had been an under-leaſe of them.

FORTESCUE, *Juſtice.* The farmer is occupier, he having them in ſuch a manner as to make a profit of them.

Therefore the ſeſſions order was quaſhed, and the rate confirmed.

HILARY

HILARY TERM,

The Ninth of George the Firſt,

IN

The King's Bench,

Sir John Pratt, *Knt. Chief Juſtice.*
Sir Littleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Juſtices.*
Sir John Forteſcue Aland, *Knt.*
Sir Robert Raymond, *Knt. Attorney General.*
Sir Philip Yorke, *Knt. Solicitor General.*

The King *againſt* Gage.

Caſe 46.

A MOTION to quaſh a conviction for keeping a greyhound and killing four hares, for which offence the forfeiture is five pounds, if not qualified.

If a ſtatute authorize a juſtice of the peace to convict "on *the* "*oath* of one or "more credible "witneſs or "witneſſes," and enact, that the perſon "ſo "convicted" ſhall be liable to ſuch a penalty, a conviction on *the confeſſion* of the party is good.

S. C. 1. Stra. 546.
1. Burr. 609.
1. Term Rep. 320.

The caſe was thus:

The ſtatute 5. *Anne*, c. 14. directs, "* That if any perſon or "perſons, not qualified by the laws of this realm ſo to do, ſhall "keep or uſe any greyhounds, &c. to kill and deſtroy the game, "and ſhall be thereof convicted, upon the oath of one or two "credible witneſſes, by the juſtice or juſtices of the peace where "ſuch offence is committed, the perſon or perſons ſo convicted "ſhall forfeit the ſum of five pounds, &c." In this caſe the man was convicted upon his own *confeſſion*, which is not within the ſtatute; and for that reaſon, if the juſtice of the peace had ſeen him kill a hare, he could not have convicted him upon his own view, becauſe that is not ſuch a conviction as is required by this ſtatute, and he has no power in this caſe but what he derives from thence; therefore the act ought to be purſued, and eſpecially where it is penal, as this is, where the forfeiture relates to the conviction; and if it be not upon oath, as the ſtatute directs, then nothing is forfeited. It is true, if this was an offence at common

THE KING *againſt* GAGE.

law, it might be otherwiſe; but being made ſo by a particular act of parliament, the method of conviction muſt be purſued as therein directed. It is like the caſe of removing a poor man to the pariſh where he was laſt legally ſettled, which by the ſtatute is directed to be "at the complaint of the churchwardens and overſeers of the "poor, &c." Now if all the reſt of the pariſh ſhould complain to the juſtices, and not thoſe pariſh-officers, it would not juſtify their making an order to remove the man, becauſe the ſtatute directs, that it muſt be made upon the complaint of the churchwardens and overſeers of the poor.

See 2. Bott's P. L. 763.

ON THE OTHER SIDE *it was argued*, that the confeſſion of the offender is within the intention, though not within the letter, of the ſtatute; for the chief end of that law was to give juriſdiction to the juſtices of the peace. Now the confeſſion of the party being the ſtrongeſt evidence againſt himſelf, therefore where a juſtice of the peace convicts an offender upon a better and ſtronger evidence than required by the ſtatute, ſuch conviction muſt be good, eſpecially ſince the act is only directory, *viz.* that the juſtices ſhall not convict without good evidence. As where a ſtatute directs, that a promiſſory note ſhall be payable to one, or his order; yet where it was made payable to one alone, without the word "order," it was held good, and within the ſtatute.

By the opinion of THREE JUDGES, this is a good conviction, for it is plain that the defendant was guilty of the offence; and if his confeſſion had been made anywhere elſe, and not to the juſtice of the peace, yet if ſuch confeſſion had been proved, the juſtice might have convicted the offender; now here was a ſtronger evidence of his guilt than required by the ſtatute; and therefore his conviction ſhall be good. * If a man come into court, and confeſs himſelf guilty of high treaſon, ſuch confeſſion is good againſt him; and even in penal laws, the intention of the legiſlators is the beſt method to conſtrue the law: now the intention of this ſtatute ſeems to be not in what method or manner of proof the offender ſhall be convicted, but that the conviction ſhould be on good proof, and a better cannot be had than the confeſſion of the party againſt himſelf. The legiſlators could not foreſee all the caſes which might happen upon this law; therefore the conviction on oath was only directory to the juſtices of the peace; and by the civil law, no man is to ſuffer without confeſſing the crime of which he is accuſed.

* [65]

So this conviction was affirmed.

EYRE, *Juſtice*. In the caſe of *The King v. Simpſon* (*a*), for deer-ſtealing, upon 2. & 3. *Will. & Mary*, c. 10. where the defendant made default, and did not appear, he was convicted, and it was adjudged a good conviction, though that act did not expreſsly give authority to convict upon default. By the ſtatute 22. *Car.* 2. c. 25. he who keeps a greyhound, not being qualified,

(*a*) Gilb. Caſes, 282. 10. Mod. 248, 341. 378. Seſſ. Caſes, 346. 1. Stra. 44.

is

is puniſhable; and the conviction is to be by oath or confeſſion of the party; which ſtatute is confirmed by this of 5. *Anne*, c. 14.; ſo that theſe laws ſhall both ſtand together. Now the ſtatute of 5. *Anne*, c. 14. having directed that the conviction ſhall be upon *oath*, whereas the other is by *confeſſion* or *oath*, it ſeems that the Legiſlature by this laſt act intended, that the manner of conviction by confeſſion ſhould ſtill be on the ſtatute 22. *Car.* 2. c. 25. and not on the ſtatute 5. *Anne*, c. 14.; for by that ſtatute the conviction is to be upon oath; and if a man might be convicted on this laſt act on his own confeſſion, there had been no occaſion to confirm the ſtatute 22. *Car.* 2. c. 25. THE KING *againſt* GAGE.

PER CURIAM, (EYRE, *Juſtice*, *dubitant.*) Let the conviction be confirmed.

The King *againſt* Watſon. Caſe 47.

UPON a motion to quaſh a conviction for a forcible detainer upon the view of the juſtices of the peace,

THE OBJECTION was, that it was ſet forth, that the defendant held *a chamber* in an houſe in ſuch a ſtreet, in the pariſh of *St. Margaret*, *Weſtminſter*, by force; but did not alledge whoſe houſe it was, or where it was ſituate, nor whether the chamber was forward or backward, or how many pair of ſtairs were up to it; ſo that if there ſhould be two chambers in this houſe, the ſheriff could not know of which to deliver the poſſeſſion.

Quære, Whether a conviction of *forcibly detaining a chamber*, without deſcribing its *locality* in the houſe, is good. 2. Hawk. P. C. ch. 64. ſ. 37.

* To which it was anſwered, that the Court will not intend that there were two chambers on one floor; it ought to appear that there were two, which it did not in this caſe; and as to the houſe in which this chamber was, that is ſufficiently deſcribed. * [66]

SECONDLY, which was the moſt material objection, the commitment of the defendant was to *Newgate*, and it was not alledged that *Newgate* was the *county-gaol*; and if not, then the juſtices have no power to commit thither, becauſe the ſtatute expreſsly requires, that the commitment ſhall be to the county-gaol *(a)*.

Quære, Whether a commitment by juſtices in *Weſtminſter* to *Newgate*, for a forcible entry, be good.

To which it was anſwered, that the Court may judicially take notice that NEWGATE is the *county-gaol*; and to prove this, *the Year-Book* 16. *Edw.* 4. *fol.* 55. was cited.

But upon reading the record, the words in the adjudication were all in the *preterperfect tenſe*, when they ought to be in the *preſent tenſe*.

A conviction of forcible entry in the *preterperfect* inſtead of the *preſent* tenſe, is bad.

And for that reaſon the conviction was quaſhed *(b)*.

(a) The ſtatute 15. *Rich.* 2. c. 2. which ſeems to be the ſtatute upon which this conviction was made, ENACTS, "That upon complaint made to any "juſtice of peace of a forcible entry or "detainer, he may take ſufficient power "of the county, and go to the place where "the force is made; and if he find any "that hold ſuch place forcibly, they ſhall "be taken and put into *the next gaol*, there "to abide *convict* until they have made "fine and ranſom to the king."

(b) In the caſe of Rex v. Morgan, in Trinity Term following, there was the like judgment for the ſame fault. NOTE, *to former edition.*—And in Rex v. Roberts, a conviction was quaſhed for the ſame reaſon, 2. Ld. Ray. 1376. 2. Stra. 608. But where a conviction by a juſtice is grounded upon an information taken at a *time paſt*, ſuch conviction may ſtate, that the informer "*came* and *gave* the juſtice "to be informed," in the preterperfect tenſe. Rex v. Hale, 1. Term Rep. 320.

HILARY TERM,

The Ninth of George the Firſt,

BEFORE

The Court of Admiralty,

AT

The Old Bailey.

The King *againſt* Sprigg and Oakley. Caſe 48.

THE DEFENDANTS were tried at THE OLD BAILEY upon an indictment for *piracy*, in ſinking a ſhip near *the Iſle of Man*.

Preſumptive evidence is not ſufficient to convict on a charge of piracy. Poſt. 74.

THE EVIDENCE was thus: *Sprigg* bought this ſhip, and made the other defendant, *Oakley*, maſter thereof; and having freighted her, he inſured five hundred pounds on the ſhip, and four hundred pounds on the cargo, to *the Weſt-Indies*. Afterwards they put to ſea, and run the goods upon the coaſt of *England*. They put to ſea again; and about two days afterwards the ſhip was ſunk; and then he proteſted at the next port, that both the ſhip and the cargo were loſt.

The proof againſt the maſter was, that the day before this ſhip was loſt, he took notice that the ſhip's boat was out of repair, and deſired ſome of the men to ſtop the chinks therein, for that he did not know how ſoon they might have occaſion to make uſe thereof: that the next day he deſired one of the ſailors to ſee how deep the water in the pump was, who in a quarter of an hour before had pumped until it was no more than two inches deep; but now, to his great ſurprize, found it ſeven inches deep; thereupon he and the reſt of the ſhip's crew began and continued to pump, but ſtill the water became higher in the ſhip, and within half-an hour was fifteen inches high: that * thereupon the ſailor who firſt pumped, and ſome of the reſt of the ſhip's crew, offered to go down into the hold, but the maſter would not ſuffer any of them to go down, nor any body to be there beſides himſelf and *Sprigg*, who was all the time below, which was proved by the ſailors; and that the water could not flow in ſo faſt, unleſs the ſhip was bored or broken in the bottom. * [67]

The

THE KING *againſt* SPRIGG AND OAKLEY.

The proof againſt *Sprigg*, the owner, was, that a day before the ſhip put to ſea he bought *an augre* which was an inch and an half wide in the bore; that the ſhip had augres enough before, and that there was no manner of occaſion for ſo wide an augre; and that he was under deck all the time the ſailors were pumping, and, as they believed, boring the ſhip.

But the evidence being only preſumptive againſt both the defendants, they were acquitted.

NOTA, This differs from *Maſon's Caſe*, poſt. 74. for there the goods of another were delivered upon a ſpecial truſt to carry to *Malaga*, but here the goods were the property of *Sprigg* himſelf, and he could not be indicted for ſtealing his own goods, with an intent to charge another, becauſe there muſt be a felonious taking as well as a converſion; now there could be no felonious taking, becauſe he himſelf was the owner, and in poſſeſſion of the goods. —NOTE, *to the former edition.*

EASTER

EASTER TERM,

The Ninth of George the First,

IN

The King's Bench.

Sir John Pratt, *Knt. Chief Juſtice.*
Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Juſtices.*
Sir John Forteſcue Aland, *Knt.*
Sir Robert Raymond, *Knt. Attorney General.*
Sir Philip Yorke, *Knt. Solicitor General.*

* Wivell *againſt* Stapleton.

Caſe 49.

BY certain articles of agreement it appeared, that the plaintiff had ſold to the defendant two hundred pounds *South-Sea* ſtock for 1425l. The plaintiff covenanted, on or before the ſhutting of the books, to transfer ſo much ſtock, upon payment of the ſaid ſum of 1425l. and the defendant covenanted to accept the ſame, and *adtunc et ibidem* to pay the money for the ſaid ſtock at or before the ſhutting up the books for the *Chriſtmas* dividend; and it was farther agreed, that if the defendant did not accept the ſaid ſtock, the plaintiff might ſell it to any other perſon at the market price, and return the overplus, if it ſold at any higher rate; but if it ſold at a lower rate, then the defendant agreed to make up the deficiency to the plaintiff. And a bond was given for the performance of the agreement.

If *A.* covenant to transfer ſtock to *B.* on payment of ſo much money, and *B.* covenant to accept ſuch tranſfer, and then to pay the money, A DECLARATION in debt for non-payment of the money muſt aver a *tender*, or an *actual tranſfer* of the ſtock.
S. C. poſt. 314. 381.
Ante, 40, 41.
Poſt. 105. 292. 314. 381.
Stra. 533. 579. 777. 832. 2. Burr. 899. 2. H. Bl. Rep. 128. 5. Com. Dig. "Pleader" (C. 53.). (C. 54.).

AN ACTION OF DEBT was brought on the bond; and the breach aſſigned was, that the defendant did not pay the deficiency of the ſaid ſum of 1638l. for the ſtock. The defendant pleaded, that he was to receive the ſtock, &c. and that he made a feoffment to the plaintiff of ſuch lands in ſatisfaction of 1360l. then due on the ſaid covenant, &c. but did not aver that the plaintiff accepted it

in

WIVELL *againſt* STAPLETON.

in ſatisfaction; nor make a full defence by *quanda, &c.*; nor did he ſet forth, that he made the feoffment in ſatisfaction of the penalty then due, on the forfeiture of the bond.

But, upon a demurrer to the plea, the defendant had judgment in the common pleas for faults in the declaration.

* [69] * And now, upon *a writ of error* in the court of king's bench, the plaintiff in error inſiſted,

FIRST, That theſe being mutual covenants to pay money on ſuch a day, &c. and the other being to transfer the ſtock, the default of payment on that day is a forfeiture of the bond; and there was no neceſſity to aver any tender. It is true, the agreement was to pay the money for the ſtock, but the word "for" in this caſe does not make it a precedent condition, *viz.* that the ſtock ſhould be actually transferred, or a transfer tendered before the money ſhould be paid, but that particle "for" ſhews what the conſideration was; ſo are the caſes of *Pordage v. Cole* (*a*), and of *Peters v. Opie* (*b*); ſo that if the agreement had gone no farther, theſe had been mutual covenants.

SECONDLY, It is true, there is a farther agreement that the plaintiff himſelf might transfer to another, if the defendant did not accept the ſtock; but that being for his own ſecurity does not alter the nature of a mutual covenant.

THIRDLY, If it ſhould be objected that the declaration is ill, becauſe no day or place is ſet forth for the transferring, or the tender to transfer the ſtock, the anſwer is, that the day is ſet forth, *viz.* that on ſuch a day he was ready at the office of the *South-Sea-Houſe*, to transfer, &c. and this tender at the office is like the tender of rent at a houſe, which is the moſt notorious place of the premiſes demiſed, for the office is the moſt notorious place of the *South-Sea-Houſe*; and by the ſtatute 6. *Geo.* 1. c. 4. which is a public law, notice is taken of that houſe; ſo that the Court will intend that was the place of tender.

FOURTHLY, But if it ſhould not be ſo intended, yet the defendant having pleaded that he gave a feoffment in ſatisfaction of ſo much money then due, this is an implied admiſſion, that the plaintiff had done every thing neceſſary to be done to entitle him to this action; and ſo is the caſe of *Vivian v. Shipping* (*c*), and of *Barnard v. Mitchel* (*d*). It is true, thoſe caſes were *after verdict*; but as to this matter, there is no material difference between a verdict and a demurrer, when the fault does not touch the point in iſſue upon the verdict, but ariſes on a collateral matter.

IT WAS ARGUED *for the defendant*, that the judgment given in the common pleas was for the faults in the declaration, *viz.* for not

(*a*) 1. Saund. 319.
(*b*) 2. Saund. 350.
(*c*) Cro. Car. 384.—See alſo Palmer v. Knight, Cro. Car. 385.
(*d*) 1. Vent. 114. 126.

laying

laying an actual transfer, or a tender of a transfer, and for not aſſigning the day and place of ſuch tender, according to the reſolution in the caſe of *Lancaſhire v. Killingworth* (*a*).

As to THE FOURTH OBJECTION, * admitting the plea is not good, yet if the declaration be bad the plaintiff cannot have judgment, and certainly that is not good; and if not, it cannot be helped by a bad plea, for that is expreſsly reſolved in *Dr. Bonham's Caſe* (*b*), *viz.* that if the declaration be bad in ſubſtance, no implication in a plea ſhall mend it, which is certainly true upon a demurrer to the plea; and ſo is the caſe of *Bamfield v. Bamfield* (*c*), though it might be otherwiſe after a verdict; and the caſes cited on the other ſide were after a verdict. * [70]

As to THE FIRST OBJECTION, it was ſaid, that this declaration is ill, becauſe the plaintiff did not alledge that he had actually transferred the ſtock, or tendered to transfer it, on ſuch a day, and at ſuch a place; and theſe are omiſſions which make the declaration ill.

As to THE THIRD OBJECTION, it is true, the plaintiff has alledged, that he was at the office in the *South-Sea-Houſe* on ſuch a day, ready to transfer, but that is not good; for though an act of parliament take notice of the *South-Sea-Houſe*, and for that reaſon it may be intended the place of transfer, yet it does not take notice at what time it was to be done, nor of any thing to be done at the *South-Sea-Houſe*; therefore the plaintiff ſhould have ſet forth at what time he was there, and that he ſtayed till the laſt hour of the day, for that is the time appointed by the law to make a tender, unleſs there be a ſpecial cuſtom to the contrary, and no ſuch cuſtom is alledged. But the time alone is not ſufficient, without ſetting forth the place of tender, which was not done; and as to the transfer, the words in this agreement *adtunc* to pay the money muſt relate to the transfer, and not to the day of payment; as in *Lutw.* 490. where the covenant was, that the plaintiff would accept ſo many ſhares on ſuch a day, and *ad idem tempus* to pay, &c. there theſe words *ad idem tempus* were adjudged to relate to the time of the acceptance of the ſhares, and not to the day of the payment of the money; and this caſe differs from the caſe of *Blackwell v. Naſh*, for there the money was to be paid at or before ſuch a day.

THE COURT. The plaintiff, who ſold the ſtock, was to transfer it on ſuch a day, on payment of ſo much money, and the defendant was to receive the ſtock, and then to pay the money. This being the caſe, the queſtion is, Whether theſe are *mutual covenants*.

(*a*) 2. Salk. 623. 3. Salk. 342. 12. Mod. 529. 1. Ld. Ray. 686. Com. Rep. 116.

(*b*) 8. Co. 120.

(*c*) 1. Sid. 336.

And

WIVELL *againſt* STAPLETON.

And THREE JUDGES (*a*) held they were not, but that they were *independent covenants* (*b*); and that the plaintiff need not ſet forth in his declaration, that he tendered to transfer, &c. becauſe (*c*) it was to be transferred upon payment of the money; ſo that the defendant having by this agreement made himſelf the firſt agent, he was obliged to pay the * money before the plaintiff was to transfer the ſtock, and then if he ſhould deny or refuſe to transfer, the defendant might have an action to compel him, becauſe he is entitled to the whole ſtock; for the plaintiff had no authority to ſell it until the defendant had refuſed to accept it; therefore he being entitled to the whole ſtock, the plaintiff is entitled to the whole money agreed to be paid for it, and may well maintain this action; and for this reaſon the judgment was reverſed by the opinion of three Judges.

* [71]

But EYRE, *Juſtice*, held, that the judgment in the common pleas ought to be affirmed. And firſt, he denied that the plea made the declaration good; for a bad plea can never mend a bad declaration, (*d*) *eſpecially if both are bad in ſubſtance, as theſe are.*

And as to the principal point, he was of opinion, that theſe were mutual and reciprocal covenants as to the transferring the ſtock and payment of the money; and that upon ſuch a covenant the plaintiff might maintain an action without laying in his declaration an actual transfer, or tender to transfer, the ſtock; but that this action was brought for a deficiency of ſixteen hundred and thirty-eight pounds, after the plaintiff had raiſed three hundred and twenty-two pounds by the ſale of the ſtock to pay himſelf; ſo that the breach was aſſigned upon an independent, and not upon a mutual, covenant. Now by the expreſs agreement, ſuch ſale of the ſtock was not to be made until the defendant failed in payment of the 1638l. and it does not appear by this record that he did fail in payment thereof; for to ſhew ſuch failure, the plaintiff ought to ſet forth that he did tender a transfer in due time and place, and that on the laſt inſtant of the day, becauſe the law has made that the time of tender, unleſs there be a ſpecial cuſtom to the contrary, which is not to be intended againſt this implication of law.

There is likewiſe another fault in this declaration, for by this agreement (if the defendant ſhould refuſe to accept the ſtock) the plaintiff had authority to ſell it at the market-price; but he has not ſet forth in his declaration, that he ſold it at the market-price, which he ought to have done, becauſe he was to refund to the defendant the ſurplus of the money, after he had paid himſelf. It is true, the defendant was to make up the deficiency, but the plaintiff

(*a*) What was ſaid by PRATT, *Chief Juſtice*, and what by FORTESCUE, *Juſtice*, are here confounded together.—NOTE *to former edition.*

(*b*) I take it, that the words "mutual" and "independent" were uſed as ſynonymous terms: and PRATT, *Chief Juſtice*, ſaid, that theſe covenants were "mutual and independent."—NOTE *to former edition.*

(*c*) This reaſon was given by FORTESCUE, *Juſtice.*

(*d*) *Quære*, if he did not aſſert this abſolutely, without adding the words in *Italic.*—NOTE *to former edition.*

has

has laid the non-payment thereof as a breach of this agreement, without ſhewing what right he had to it; and he cannot have a double remedy, *viz.* one for non-payment of the deficiency, and another for the breach of the mutual covenant. * He agreed, that the plaintiff had aſſigned a breach of the mutual covenant, but that he did not rely on it, but went farther, by ſaying, that he paid himſelf three hundred and twenty-two pounds; therefore he ſhould ſhew, that he had a right ſo to do; ſo that this breach which he had aſſigned was only as a general breach, and introductive to his action, the real cauſe whereof was the ſecond breach aſſigned, *viz.* the non-payment of the deficiency. Now if there was not a ſufficient tender of the transfer, the plaintiff could not entitle himſelf to this action upon the ſecond breach aſſigned, becauſe he did not lay a tender in proper time and place; for if the office at the *South-Sea-Houſe* was not a proper place of tender, or to transfer the ſtock, then the plaintiff could not bring his action for this deficiency; and for aught that appears to the Court, the defendant was ready to pay the money at the time and place, becauſe it does not appear that the plaintiff was there at the laſt inſtant it could be tendered. But if there be any thing particular, as that a transfer can only be made between certain hours, as between eleven and one o'clock, it muſt come on the defendant's ſide.

* [72]

But afterwards, in *Michaelmas Term*, in the eleventh year of *George the Firſt*, the judgment was reverſed, by the opinion of PRATT, *Chief Juſtice*, and two other Judges.

PRATT, *Chief Juſtice*, delivered the reſolution of the Court. The averment of the tender is inſufficient, being alledged to be made at the *South-Sea-Houſe*, without ſhewing that to be the uſual place for transferring; the plea is alſo inſufficient; ſo that the queſtion reſts only on the declaration. If it appear that the plaintiff was intitled to ſell the ſtock, then the declaration is good: the covenants are mutual, ſo that there is no neceſſity to aver any transfer of the ſtock or tender thereof; the defendant covenants to accept before the ſhutting of the books; the time of payment is not tied up by the covenant to the time of acceptance; the time of acceptance is any time before the ſhutting of the books; ſo is payment, which is the true conſtruction of the words *adtunc et ibidem ſolvere*; for otherwiſe the defendant, by non-acceptance of the ſtock, might prevent his obligation to payment; covenant for payment is not expreſſed to be *ſuper transferationem*, but *in conſideratione præmiſſorum*, which is intended the covenant to transfer: and this conſtruction ſeems the intent of the parties, which is the true rule of conſtruction.

This judgment of reverſal was afterwards reverſed in the houſe of lords; for that the reſidue of the money was not due to the plaintiff until he had made a good and legal tender of the ſtock, and the defendant had made default: and the plaintiff not having ſhewn this in his declaration, it was adjudged, that he had not laid a ſufficient breach therein.

Afterwards

Wyvell *againſt* Stapleton.

Afterwards the plaintiff brought another action, and laid a proper breach, and the defendant pleaded the former record in bar, to which the plaintiff demurred. *Sed quære quid inde venit.*

Caſe 50.

Lovelock *againſt* Sorrel.

In covenant for not repairing, brought againſt an aſſignee of an aſſignee, the plaintiff need not ſet forth the intermediate aſſignments.

A LEASE was made to *W. R.* and afterwards the leſſor brought an action of covenant againſt the aſſignee of an aſſignee, for not repairing, but did not ſet forth the intermediate aſſignments. The defendant pleaded, that this leaſe did not come to him by any meſne aſſignment of the leſſee. To which plea the plaintiff demurred.

2. Stra. 229. Dougl. 314. Bac. Dig. 303.

IT WAS INSISTED, *to maintain the demurrer*, that the plea was too general, and altogether immaterial; for if the defendant had the land by any aſſignment from the original leſſee, he is ſubject to this covenant; therefore he ſhould have pleaded, that the leaſe did not come to him, and not that it did not come to him by any meſne aſſignment; and ſo is 1. *Sand.* 238. 285. and 2. *Sand.* 188.

ON THE OTHER SIDE *it was argued* for the defendant, that in an action of covenant againſt *an aſſignee* of *a leſſee*, the plaintiff ſhould ſpecially ſet forth all the intermediate aſſignments, and ſhew how the defendant came to the land, and not as aſſignee generally.

* [73] * But this was denied by THE COURT, and adjudged, that the declaration was good againſt the defendant as aſſignee general, becauſe it may often happen that the leſſor may not know all the intermediate aſſignments.

There was no judgment given this Term.

In the *Trinity Term* following an objection was made to the declaration, that the plaintiff had declared on a leaſe for years *adhuc venturam*, when by the very record it appeared, that the leaſe was expired by the effluxion of time, therefore he had declared on another leaſe.

But THE COURT gave no judgment as to this point; but ſaid, that in all actions of trover the uſual form of declaring was, that the goods came to the defendant *per inventionem*; but it would certainly be an immaterial plea if the defendant ſhould deny the finding, as in *Sand.* 238, *&c.*

See 2. Mod. 217. Show. Rep. 155.

Caſe 51.

Anonymous.

Sive facias will not lie for coſts without ſhewing that the judgment was *affirmed* in THE EXCHEQUER-CHAMBER. Poſt. 315.—Cro. Eliz. 587. Cro. Jac. 636. 2. Stra. 1199.

A JUDGMENT was given in the king's bench; and, upon a writ of error brought in THE EXCHEQUER CHAMBER, that judgment was affirmed; and now the plaintiff in the action

brought

brought a *ſcire facias* for the coſts he had ſuſtained by the delay of the execution. ANONYMOUS.

And IT WAS OBJECTED, that it ought not to be allowed.

FIRST, Becauſe it was brought in *London*, and not in *Middleſex*, where it ought to be brought; and for a default in the writ itſelf,

SECONDLY, Becauſe it did not ſet forth what became of the caſe in THE EXCHEQUER-CHAMBER, that is, it did not ſhew that the judgment was affirmed; for if it was not, then the plaintiff has no right to the coſts.

ON THE OTHER SIDE it was anſwered,

FIRST, That a *ſcire facias* may be laid in any county where the original action was brought. So if an action ſhould be brought on the original judgment, ſuch action might be laid in any county, and the *ſcire facias* may be brought where that judgment was obtained.

And, SECONDLY, all that is neceſſary to be alledged in it is, that judgment was given for the plaintiff, and is not ſatisfied.

THE COURT. It is true, an action of debt upon the original judgment, or upon a recognizance, may be laid in any county, but a *ſcire facias* muſt always go into that county where the execution on the original judgment ſhould be made.

* Afterwards, upon reading this *ſcire facias*, it was, as before, obſerved, that it did not ſet forth what became of the cauſe in THE EXCHEQUER-CHAMBER, and certainly the plaintiff cannot have this writ without ſhewing what became of the judgment removed by this writ of error; and it is unreaſonable he ſhould have it for coſts in delay of execution, without ſhewing that the judgment was *affirmed* in THE EXCHEQUER-CHAMBER. * [74]

EASTER TERM,

The Ninth of George the First,

AT

The Old Bailey,

UNDER

A Special Commiſſion,

BEFORE

Sir Henry Penrice, *Knt. Judge*

OF

THE HIGH COURT OF ADMIRALTY,

AND OTHERS.

The King *againſt* Maſon. Caſe 52.

THE DEFENDANT, who was maſter of a ſhip, was indicted and tried upon ſeveral indictments at THE OLD-BAILEY, before SIR HENRY PENRICE, *Judge of the Admiralty*, and ſeveral other civilians, and before ſome Judges of the common law aſſiſting them; and this by virtue of a commiſſion under the great ſeal, according to the ſtatute 28. *Hen.* 8. c. 15.

Evidence that the captain of a ſhip tampered with the carpenter to knock her on the head; ordered a fire to be made in the cabin; threw the buckets overboard; and made the crew drunk; will not maintain an indictment for feloniouſly burning the ſhip.

THE FIRST INDICTMENT on which he was tried was, for maliciouſly and piratically burning a ſhip, to the great damage and defrauding both the owners and inſurers, againſt the peace, and againſt the form of the ſtatute (*a*).

The fact upon the trial appeared to be as follows:

THE SHIP was laden with linen at *Rotterdam*, and bound for *Malaga*, in *Spain*. The defendant, when he received the *bill of lading*, was ordered by the merchants and owners to put in at *Lynn Regis*, in *Norfolk*, in order to get a *Mediterranean paſs* for his

(*a*) See the 22. & 23. *Car.* 2. c. 11.; c. 12.; and 11. *Geo.* 1. c. 29. ſ. 6. the 1. *Anne*, ſt. 2. c. 9.; the 4. *Geo.* 1. 1. Hawk. P. C. c. 48. ſ.

THE KING *againſt* MASON.

ſafety. It was proved by one witneſs, who was the carpenter of the ſhip, that the defendant, when he came near to *Dartmouth-Bay*, tampered with him to know what he would take to knock the ſhip on the head. It was proved by another witneſs, that the defendant gave the ſhip's crew ſome bowls of punch on the day the ſhip was burnt, and made them all drunk; and afterwards ordered this witneſs to make a fire in the cabin, where there was none for a month before that time; which he did when the defendant and moſt of the crew were going aſhore, except two who were very drunk; and that there was but one bucket belonging to the ſhip, which the defendant had ordered a ſailor to fling overboard the day before the ſhip was burnt. The two ſailors who remained drunk in the ſhip made oath, that they were ſleeping there until the ſhip was ſo much on fire, that they could not relieve her nor themſelves, but that they were carried off by another ſhip's boat then in the harbour.

*[75] * Upon this evidence the preſumption was very ſtrong, that the ſhip was burnt by that fire which was firſt made in the cabin; but this being only preſumption, and no direct proof, the defendant was acquitted.

If goods be laden on board a ſhip, with a *ſpecial truſt* to deliver them at a certain place, the captain is not guilty of *piracy* by *fraudulently* converting them to his own uſe.

THE DEFENDANT was afterwards tried upon another indictment for *piracy*, and ſtealing the goods which he had at *Rotterdam* on ſhipboard, and conſigned to *Malaga*.

The evidence againſt him was, that the goods were delivered to him, and that afterwards he got both the ſhip and the cargo inſured at *London* and *Rotterdam*; and when he came to the coaſts of *England*, he privately run all the goods; and when the ſhip happened to be burnt, he came to *Dartmouth*, and proteſted both ſhip and cargo as burnt and loſt (according to the method of proteſting inſured ſhips), though the cargo was privately run by him as before-mentioned, which was proved by ſeveral witneſſes. The owner of the goods proved the property and the delivery, &c.

THE COUNSEL *for the king* laid it down for a rule, that all acts which amount to *felony* at land will amount to *piracy* at ſea; that upon this evidence it plainly appeared, that the defendant had run the goods *animo furandi*, which if done at land would be felony; as for inſtance, if goods are delivered to a carrier, and he ſteal them *animo furandi*, it is felony, and ſo is this piracy; for it appears, by his proteſting that the ſhip and cargo were burnt and loſt, that he deſigned to cheat both the owners and inſurers. It is true, if the maſter of a ſhip run goods, with an intention to cheat the king of the duties, this is no piracy, though the goods ſhould happen to be ſeized as forfeited to THE CROWN for not paying the duties. But here by the defendant's proteſting the goods to be loſt, when they were not, but privately run by him, this muſt be with an intention to cheat and defraud the owners, for it was done *animo furandi*, and his intention makes it piracy, as a felonious intent makes the action felony.

The

THE DEFENDANT produced an inſtrument in writing, under the merchant's hand who freighted this ſhip (as he pretended), by which he had authority to run the goods, as he ſhould * find opportunity. But upon enquiry and proof this ſeemed to be a *forgery*, for the merchant, on oath, denied his ſigning the inſtrument; and the witneſs to it being now produced to prove the ſigning it, made oath, that he did not know the merchant therein mentioned, but that the defendant and another were at a public-houſe in *Rotterdam*, and ſent for this witneſs, who came, and then the defendant told him, that the other perſon there preſent was his merchant, and that he ſent for him to be a witneſs to the power his merchant gave him; and thereupon the inſtrument being ready drawn, that other perſon ſigned it, and this witneſs atteſted it. All which gave room for a preſumption, that he intended the running the goods before he left *Holland*, *animo furandi*. THE KING *againſt* MASON. * [76]

But notwithſtanding this evidence, the Judge of the Common Law, who aſſiſted the Judge of the Admiralty, directed the jury to acquit the defendant, for that the goods were delivered to him upon *a ſpecial truſt* to deliver them at *Malaga*, and that it could be no *piracy* to convert thoſe goods in a fraudulent manner until that ſpecial truſt was determined, no more than it could be *felony* in a carrier by converting of goods delivered to him to carry to ſuch a place before that ſpecial truſt was determined. And this appears to be the law of *England* by concurrent reſolutions in ſeveral law-books (*a*).

THE COUNSEL *for the king* thereupon inſiſted, that though this was not piracy before the *ſpecial truſt* was determined, yet the breaking open ſome bales of linen on board this ſhip made it piracy, for this was a converſion with force and *animo furandi*; and that it would be felony in a carrier to break open any boxes delivered to him, and to convert them *animo furandi*, for ſuch a converſion by force is felony, though the ſpecial truſt was not determined.

* But THE COURT held, there was a difference between opening bales of linen and breaking open the locks or nails of boxes by a carrier; and that this was no piracy, * [77]

(*a*) 3. Inſt. 107. Hale's Pleas of the Crown, 61. Staundf. 25. 13. *Edw.* 4. 9. Kelynge, 81. The caſe in *Kelynge*, 81. was thus: A man came to *Smithfield Market* to ſell a horſe, and a jockey coming thither to buy a horſe, the owner delivered his horſe to the jockey to ride up and down the market to try his paces, but inſtead of that the jockey rode away with the horſe; this was adjudged felony. And certainly it is felony, but different from *Maſon's Caſe*, becauſe the horſe was not delivered to the jockey upon any *ſpecial truſt*, as the cargo was to *Maſon*, but was only a general delivery, and no more than the common caſe of a ſhopkeeper ſhewing or delivering goods in his ſhop to his cuſtomers, where a converſion of ſuch goods is certainly felony. But the delivery of goods upon a *ſpecial truſt* is commonly public and notorious; and therefore if the party convert them before that truſt is determined, it is not felony, becauſe he may have a proper remedy by an action of *trover* to recover damages.—NOTE *to the former edition.*

THE KING *againſt* MASON.

THE JURY, thereupon, acquitted the defendant of this indictment.

The defendant was afterwards tried upon a third indictment for a *cheat*, in committing the acts aforeſaid, and was found *guilty*; and fined, and impriſoned till he paid the fine.

An exemplification of a cuſtom-houſe entry of goods abroad, is not evidence to prove the goods delivered to the captain.

NOTE, To prove the delivery of the goods to the captain, an exemplification of the entry of them made in the cuſtom-houſe books at *Rotterdam*, atteſted by a *public notary*, and ſealed with the public ſeal there, was offered in evidence.

But THE COURT would not admit this exemplification to be given in evidence.

Bull. N. P. 225. 227.

EASTER TERM,

The Ninth of George the Firſt,

IN

The King's Bench.

Sir John Pratt, *Knt. Chief Juſtice.*
Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Juſtices.*
Sir John Forteſcue Aland, *Knt.*
Sir Robert Raymond, *Knt. Attorney General.*
Sir Philip Yorke, *Knt. Solicitor General.*

Coke *againſt* Allen.

Caſe 53.

A warrant of attorney may be filed at any time before the defendant pleads.

ERROR in the court of king's bench, upon a judgment given in the court of common pleas.

The error aſſigned was, for not filing a *warrant of attorney*, as required by the ſtatute 4. & 5. *Anne*. c. 16. for the amendment of the law, by which it is enacted, "That the attorney for the plaintiff ſhall file his warrant the ſame Term in which he declares, "and the attorney for the defendant in the ſame Term in which he "appears."

S. P. accord. in Fitzg. 191. Str. 526 2. Stra. 707. 4. Com. Dig. "Attorney" (B. 8.).

But this was over-ruled; for if the plaintiff's attorney file the warrant at any time before the defendant has pleaded, it is ſufficient to maintain the judgment, though by the ſaid ſtatute he may be fined if he do not file it in the Term when he declares; but the not filing it in manner as aforeſaid does not impeach the judgment.

Caſe 54.

Spackman *againſt* Huſſey.

A declaration in an inferiorcourt, that the defendant became indebted upon an *account ſtated within the juriſdiction*, is ſufficient.

THE PLAINTIFF declared in THE MARSHAL'S COURT upon an *inſimul computaſſet infra juriſdictionem*, &c. and had judgment.

And now, upon a motion to ſet it aſide, it was inſiſted, that *the account* does not alter *the duty*, for that may ariſe in *York*; and no other conſideration being laid to intitle the Court to any juriſdiction, the judgment ought not to ſtand.

But IT WAS ADJUDGED, that *the account* was ſufficient to give the Court a juriſdiction (*a*).

(*a*) See Emery *v.* Bartlett, that an action in an inferior court, upon an account ſtated, need not ſtate that the ſums in arrear, concerning which the parties accounted, were in arrear within the juriſdiction of the court, 2. Ld. Ray. 1555. 6. C. Stra. 827. Stanion *v.* Davis, 6. Mod. 223.—But ſee Trever *v.* Wall, that in an *aſſumpſit* in an inferior court, for money had and received, the declaration muſt alledge, that the money was had and received within the juriſdiction, as well as that the defendant promiſed to pay within it, 1. Term Rep. 151.—See alſo 1. Show. 395. 2. Show. 246. 2. Wilſ. 16. 1. Ld. Ray. 211. Cowp. 20.

TRINITY

TRINITY TERM,

The Ninth of George the First,

IN

The King's Bench.

Sir John Pratt, *Knt. Chief Juſtice.*

Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.*
Sir John Forteſcue Aland, *Knt.* } *Juſtices.*

Sir Robert Raymond, *Knt. Attorney General.*

Sir Philip Yorke, *Knt. Solicitor General.*

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* Tucker *againſt* Goldburne. Caſe 55.

In debt upon the aſſignment of a bail-bond, the proceſs on which the arreſt was made muſt be ſet forth.

AN ACTION OF DEBT was brought upon an aſſignment of a bail-bond taken by the ſheriff, who had arreſted the defendant upon a *capias*, *&c.*; and upon a demurrer to the declaration,

IT WAS OBJECTED, that the plaintiff had not ſet forth the *capias*, or the *teſte* or *a return* of any * *capias*, as he ought to have done (*a*); and the court of common pleas being of that opinion,

A WRIT OF ERROR was brought in the court of king's bench.

But the judgment of the common pleas was affirmed, for it is the *capias* which gives life to the bond.

(*a*) Cro. Eliz. 647. 1. Sid. 159. and Saxby *v.* Kirkus, in the king's bench, in Hilary Term, 1754, Sayer, 116.

Moor *againſt* Thompſon. Caſe 56.

Where the jury may ſever the damages for which the plaintiff hath declared.

IN AN ACTION OF TRESPASS brought by the plaintiff in the court of common pleas, for entering on the plaintiff's land on the twenty-fifth day of *March*, in the fourth year of *George the Firſt*, with a *continuando* of the ſaid treſpaſs the twenty-fifth *March*, in

Moor *against* Thompson.

in the ſixth year of *George the Firſt* (which was two years), &c. *ad damnum*, &c.

The defendant pleaded, that the lands were copyhold, and the freehold of one *Green*.

The plaintiff replied, and, admitting them to be copyhold, ſet forth a ſurrender made to him, and that he was admitted a whole year before he brought this action of treſpaſs, &c. *viz.* on the ſeventh day of *April*, in the fifth year of *George the Firſt*.

The defendant in his rejoinder denied the ſurrender: iſſue thereon.

At the trial there was a verdict for the plaintiff; and the jury gave damages for that year only, *à prædicto* the ſeventh day of *April*, in the fifth year of *George the Firſt*, whereas the plaintiff had declared for two years damages.

*[79] And now upon * a writ of error brought, it was inſiſted, that though the plaintiff had a verdict, yet if the jury did not find enough it is an inſufficient finding; and here they had found damages only for one year, where the plaintiff had declared for two years damages, and the jury cannot ſever the damages for which the plaintiff had declared.

The Court. Had the damages been aſſeſſed generally, it had not been good, becauſe upon the record it appears, that the plaintiff ought to recover no damages until the ſeventh of *April*, in the fifth year of *George the Firſt*, becauſe till then he hath no title to the lands. If the damages had been aſſeſſed, they might have been releaſed.

The judgment was affirmed.

Caſe 57.

Colebrook *againſt* Diggs.

Tueſday, 2 *June* 1723.

If a plaintiff in debt on bond for the payment of money obtain a judgment in the king's bench, and the judgment is affirmed on error in the exchequer-chamber, the defendant, on bringing a writ of error to the lords, muſt give freſh bail, according to 3. *Jac.* 1. c. 8. or the plaintiff may take out execution.—S. C. 1. Stra. 527. 1. Salk. 97. 1. Com. Dig. "Bail" (N.). 5. Com. Dig. "Pleader" (3. B. 12).

Error in the exchequer-chamber upon a judgment given in the court of king's bench for ſixteen hundred pounds, in an action of debt on bond conditioned for payment of money only, and there the judgment was affirmed.

A writ of error was afterwards brought in the house of peers. The plaintiff in the original action was about to take out execution againſt the defendant, for not entering bail, according to the ſtatute 3. *Jac.* 1. c. 8. ſ. 1. (*a*), which enacts, "That "no execution ſhall be ſtayed by any writ of error or *ſuperſedeas* "thereupon, in any action of debt upon a ſingle bond, or upon any "obligation with condition for payment of money only, or for

(*a*) Perpetuated by 7. *Geo.* 1. c. 4. ſ. 4.; and ſee 16. & 17. *Car.* 2. c. 8. perpetuated by 22. & 23. *Car.* 2. c. 4.

"rent,

" rent, or upon any contract in the courts of record at *Weſtminſter*, " or in the counties palatine, or in the courts of great ſeſſion ; " unleſs ſuch perſon, in whoſe name ſuch writ of error is brought, " with two ſureties, ſuch as the court wherein the judgment is " given ſhall allow of, ſhall firſt be bound unto the party for whom " judgment is given, by recognizance in double the ſum recovered, " to proſecute the writ of error with effect, and alſo to pay (if the " judgment be affirmed) all debts, damages, and coſts, adjudged " upon the former judgment, and all coſts and damages to be " awarded for delay of execution."

MR. REEVE, *for the defendant*, inſiſted, that having already entered into ſuch a recognizance in the court of king's bench before the writ of error was allowed, he is not obliged by this ſtatute to give a new recognizance of bail, having already purſued the ſtatute by giving bail in that court where the judgment was given, and it would be very hard for him to be bound in two recognizances for one and the ſame matter. This caſe differs from the caſe of *Tilly v. Richardſon* (*a*), for there the original judgment was obtained in the court of common pleas, and bail given there on removing the record into this court; and when a new writ of error was brought on the judgment in this court, new bail was given, becauſe no recognizance was before entered into in this court; for this court could take no notice of the recognizance given in the court of common pleas; but if any new bail ought to be given, it ought to be in THE EXCHEQUER-CHAMBER, where the judgment is affirmed.

ON THE OTHER SIDE *it was inſiſted* (*b*), that this matter is ſo plain that it was never controverted. Upon a writ of error in parliament, the plaintiff in error muſt alledge the judgment in the court of king's bench to be erroneous, as well as the judgment in THE EXCHEQUER-CHAMBER; for after an affirmance in THE EXCHEQUER-CHAMBER, this court awards the execution; for that court remits the cauſe with the proceedings: and this writ is brought in delay of execution of the judgment; but the firſt recognizance does not extend to the coſts ſuſtained in THE HOUSE OF PEERS, but only to the coſts for delaying the execution by the firſt writ of error; ſo that if a new recognizance ſhould not be given, the coſts upon the writ of error in parliament, if the judgment ſhould be affirmed, would be loſt. * It is true, the ſtatute enacts, " That bail ſhall be given in the ſame court where the " judgment was given;" but this is only explanatory, and intended that it ſhould be given where the judgment was of record. * [80]

THE COURT. After an affirmance in THE EXCHEQUER-CHAMBER, we award execution, which we ought not to delay, without taking new ſecurity for the damages and coſts. This act is a remedial law, and is to be extended by equity. It is conſidered

(*a*) 1. Salk. 97. pl. 2. S. C. 2. Ld. Raym. 840. S. C. 7. Mod. 130.

(*b*) By WHITAKER, *Serjeant*.

COLEBROOK *againſt* DIGGS.

as a judgment and record in this court, after it is affirmed in THE EXCHEQUER-CHAMBER, for the writ of error returnable in parliament is always directed to the chief juſtice of this court, and he carries up the record. And there is no manner of inconveniency by entering into two recognizances; for both are the ſame in reſpect to the plaintiff in error, becauſe by the late ſtatute he has a proper remedy, if the plaintiff in the original action take out execution for more than is due; but it would be very inconvenient for him to be delayed by a writ of error, and to have no ſufficient ſecurity to make ſatisfaction for his loſs. There is a caſe (*a*) where an executor was obliged to give bail in *the chamberlain of London*'s court, and likewiſe bail for the ſame thing in *the ſpiritual court*, and ſo double bail; and this was warranted only by a particular *cuſtom in London*, which is not to be favoured ſo much as a general ſtatute made for the advancement of juſtice.

So the party was ruled to put in new bail in the court of king's bench, elſe execution awarded.

(*a*) Luck's Caſe, Hobart, 247.

Caſe 58.

Wilkinſon *againſt* Matthews.

In what caſe a perſon may be arreſted on an *eſcape-warrant.*

UPON A MOTION to diſcharge the perſon taken upon an *eſcape-warrant* after he had obtained *a day-rule*,

IT WAS RULED, that the defendant ſhould ſhew cauſe on ſuch a day,

And afterwards upon that day he ſhewed for cauſe, that the taking upon this warrant was about eight of the clock in the morning, and long before the Court was ſat, ſo that the plaintiff could not have *a day-rule* at that time.

But this was over-ruled, becauſe in this caſe there ſhall be no fraction of a day; and the opinion of the late CHIEF JUSTICE HOLT was now mentioned, that where a perſon is taken upon an *eſcape-warrant* * who had obtained a rule for that day, that the proſecutor ſhould be committed; and that it was ſufficient if the party had delivered his name in writing to the clerk the night before the day he moved for *a day-rule*, as ſoon as the Court ſhould ſit.

* [81]

But it appeared in the principal caſe, that *the day-rule* was obtained after the party was taken upon the *eſcape-warrant*, on purpoſe to avoid the commitment by virtue of that warrant; and that his name was not delivered to the clerk the night before, but ſitting the Court.

IT WAS RULED, that he ſhould continue in cuſtody (*a*).

(*a*) See *Bradſhaw's Caſe*, where a rule was made on a conſtable to ſhew cauſe, &c. for arreſting one who had a ticket, and her name was in the petition of the day; but the rule was never drawn up.—NOTE *to former edition.*

The

The King *againſt* Ackworth and Others. Caſe 59.

UPON A MOTION for *an attachment* againſt the defendants, upon an affidavit of their withdrawing a witneſs from giving evidence at the aſſizes in a trial had there upon an information againſt certain ſmugglers;

On a motion for *an attachment*, if the defendant poſitively deny, by his affidavit, the facts contained in the affidavits of the proſecutor, the rule ſhall be diſcharged. Poſt. 110.

It was ſhewed for cauſe why an attachment ſhould not go, that the defendants had affidavits to diſprove the charge made againſt them by the affidavits of the plaintiff; thereupon thoſe affidavits were now read in court: and it was affirmed to be the conſtant practice, that though the affidavits produced by the plaintiff were very full as to the charge, yet if the perſon denied ſuch charge by as plain and poſitive affidavits, in ſuch caſe he ſhould be diſcharged, and *an attachment* ſhould not go; and that if ſuch affidavits were not true, then the plaintiff had a proper remedy, which was by indicting them for perjury. And becauſe a man ſhall not be kept in cuſtody, and deprived of his liberty, by *an attachment*, therefore this is the only caſe where a negative oath ſhall be preferred to an affirmative.

All which was agreed by THE COURT; but that the preſent caſe differed; for the defendant did not by his affidavit plainly deny the fact with which he was charged.

MICHAELMAS TERM,

The Ninth of George the First,

IN

The King's Bench.

1722.

ON

A Trial at Bar,

BEFORE

Sir John Pratt, *Knt. Chief Juſtice.*
Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Juſtices.*
Sir John Forteſcue Aland, *Knt.*
Sir Robert Raymond, *Knt. Attorney General.*
Sir Philip Yorke, *Knt. Solicitor General.*

Caſe 60.

* The King *againſt* Layer.

Wedneſday, 31 *October* 1722 (*a*).

CHRISTOFER LAYER being committed to THE TOWER for high treaſon, in compaſſing the death of the king, and an indictment having been found againſt him at *Rumford*, in *Eſſex*, before ſpecial commiſſioners of *oyer* and *terminer*, and being removed hither by *certiorari*, was afterwards brought up by *habeas corpus* to the bar, and arraigned upon the indictment.

The Court will not order a priſoner indicted for high treaſon to be *unſettered* at the time of his arraignment; or becauſe he is confined in THE TOWER; but during his *trial* his *irons* ought to be taken off, unleſs there be danger of a rescous or eſcape.—S. C. 6. St. Tr. 229. S. C. 8. St. Tr. 570. S. C. Forteſ. 396. S. C. Foſt. 198. 231. 245. 2. Inſt. 325. 3. Inſt. 34. Mirr. ch. 5. ſ. 54. 2. Hale, 219. Kely. 10. Staundf. 133. 4. Hawk. P. C. c. 28. ſ. 1.

(*a*) See the ſtatute 24. *Geo.* 2. c. 48.

HUNGERFORD

THE KING *againſt* LAYER.

HUNGERFORD and KETTLEBY, who were aſſigned his Counſel, moved, that *the irons* might be ſtruck off his legs, and inſtanced the caſes of *Gordon*, *King*, and others, where it had been ſo done before they pleaded; and argued, that he was not obliged to plead until his fetters were taken off (*a*); and that it was the opinion of the late CHIEF JUSTICE HOLT, that it ought to be ſo done; that this perſon was the firſt *Tower* priſoner that ever had irons on his legs; and that there were no ſuch inſtruments there until now brought from NEWGATE.

THE PRISONER himſelf moved, that *the irons* might be taken off before he pleaded, becauſe lying in his clothes all night, and other inconveniencies occaſioned by thoſe irons were ſo painful to him, that he being deprived of his reſt had not the free uſe of his reaſon; that he hoped to have a fair trial as allowed by the law, without any undue ſeverities; and he complained of ſome ill uſage as he was bringing to the hall.

THE COURT anſwered, that they could not take notice of ſuch ill uſage, becauſe they did not know by whom it was done; and as for *the irons* being taken from his legs, it is true, that it was done in thoſe caſes cited by his Counſel, but it was where the priſoners had pleaded to their ſeveral indictments, and were to be tried on the ſame day; and that it would be to no purpoſe to inſiſt on this matter * for ſo little a time as the priſoner now had to ſtand at THE BAR; and as for taking them off in THE TOWER, the Court would make no order, becauſe, if they did, it might be an excuſe to his keeper if he (the priſoner) ſhould eſcape, therefore it muſt be left to his keeper's diſcretion how to uſe his priſoner, eſpecially ſince he had already attempted to eſcape.

* [83]

THE COURT then recommended it to the priſoner's Counſel, that if they had any exceptions to the indictment, they would now ſhew what thoſe exceptions were.

The Court will not quaſh an indictment of high treaſon for a miſ-recital of the ſpecial commiſſion under which it was taken.

Whereupon they made the exceptions following: Miſpelling, falſe *Latin*, nonſenſe, and ſurpluſage, and that there were inſignificant and inſenſible words in the very commiſſion, by virtue whereof this indictment was found, as *plenius veritat* (*b*), which words cannot be conſtrued to any manner of ſenſe.

But as to the fault objected to the commiſſion by virtue whereof this indictment was taken, it was anſwered and reſolved, that this Court has no power over it, ſo as to quaſh the indictment. And though the objection is, that *plenius veritat* cannot be conſtrued in any manner of ſenſe, yet by tranſpoſing the words it may be made good ſenſe. They are in the recital of the commiſſion of the caption of the indictment, and muſt refer to the former words,

(*a*) Cranbourn's Caſe, 3. Inſt. 34. Mirror, c. 5. ſ. 1. Kelynge, 10.

(*b*) The words are, "*Et per quos vel* "*per quem, cui vel quibus, quando, qualiter,* "*et quomodo, et de aliis articulis et circum-*"*ſtantiis præmiſſa et eorum quodlibet, ſeu* "*eorum aliquod vel aliqua, qualitercunque* "*concernent. ſplenius veritat.*"

"*ad*

" *ad inquirend.*". They are inſerted in the form of a commiſſion publiſhed in a treatiſe allowed by all the Judges, called, " A " Collection of all Statutes relating to High Treaſon, compoſed " for the Aſſiſtance of the Juſtices in *Scotland.*"

But HUNGERFORD ſaid, that the authority of that book was denied by all the Judges, except PRATT, *Chief Juſtice*, in the caſe of *Mathews* (*a*); for it was reſolved, that a panel of the jury delivered to the priſoner charged for high treaſon, without any additions or places of abode, is ſufficient, contrary to that treatiſe (*b*).

FIRST as to the miſ-ſpelling. The priſoner is called in the indictment *Chriſtopherus*, with an *e*, when it ſhould be with an *o*, as *Chriſtophorus*.

An indictment is good, although it name the defendant *Chriſtopher* inſtead of *Chriſtopher*.

It was anſwered, that they did not know what his name was, and probably he might be baptized by that name; but if he was not, it might be pleaded *in abatement*; and though the lexicons and dictionaries might warrant *Chriſtophorus* to be the right name, yet the other might likewiſe be a name of baptiſm.

THE COURT. As to the miſ-ſpelling of the priſoner's name, he may plead that matter in abatement, for he may be as well * known by the name of *Chriſtoferus* as by the name of *Chriſtofer*: and this objection deſerves no other anſwer.

* [84]

SECONDLY, It was objected, that the words in this indictment are, " That he (the priſoner) *compaſſavit, imaginatus fuit, et* " *intendebat ad ſacram perſonam domini regis capiend. feiſiend. et* " *impriſonand.*;" now here the conjunction copulative " *et*" ſhould have joined the word " *intendebat* to the ſame mood and tenſe, but inſtead thereof it is joined to verbs of the preterperfect tenſe, &c.; therefore it makes incongruous *Latin*, and improper in an indictment, and makes it vitious.

" *Compaſſavit,* " *imaginatus* " *fuit, et inten-* " *debat,*" will not vitiate an indictment of treaſon.

THE COURT. It is not true. The verbs are not all in the ſame tenſe; but though they are not, and the *preter tenſe* is coupled with the *preterperfect tenſe*, yet that is not material, and ſhall not make this indictment naught; either word is ſufficient to charge the defendant with the intent of compaſſing; either *overt act* is ſufficient.

THIRDLY, It was objected, that the words " *ad ſeiſiend.* the " king" is an inſignificant word, not known in the law, or in any *Latin* author; and for theſe reaſons this indictment ought to be quaſhed, and the rather, becauſe all forms of indictments, eſpecially in high treaſon, ought to be very certain.

A charge of treaſon *capiend. ſeiſiend. et impriſonand.* the king, is good.

7. Rep. 5.

(*a*)

(*b*) The late *Mr. J. Foſter* obſerves, that the little tract intituled, " The " Method of Trial of Commoners in Caſes " of High Treaſon," publiſhed in the year 1709, by order of the houſe of lords, directeth, " That the addition of dwel- " ling-places and profeſſions of the jurors " be inſerted in the copy of the panel; " but that the act (27. *El.* c. 7.) doth " not require that exactneſs, and that the " practice is otherwiſe." Foſt. Diſc. High Treaſon, chap. 3. p. 230.—See Matthews' Trial, 9. St. Tri. 680. No. 42. ſo *quere* which is the book alluded to.—NOTE *to former edition.*

THE KING against LAYER.

THE COURT. As to the words "*ad seisiend.*" it being only an overt proof of the design, it is well enough if any proof be made of an *overt act* of the things laid in the indictment. Besides, it is not a word unknown in the law, for it is used every day in the court of exchequer, where *seisire facias* are words in a writ sent to the sheriff, and he returns *seisiri feci.* "*Seisiend.*" is a proper word; but without it there is sufficient to charge *Mr. Layer.*

On an indictment for high treason, if a misnomer be pleaded in abatement, and the attorney-general demur to the plea, the Court will not allow the prisoner time to reply, or to join in demurrer.

THE OBJECTIONS being over-ruled, he was demanded to plead.

The prisoner pleaded *misnomer in abatement*, and his plea was received, read, and filed.

Afterwards he was sent back to THE TOWER, and ordered to be brought again to THE BAR on *Saturday*, on the morrow of *All Souls*; and being accordingly brought up on that day, namely, the third of *November*, THE ATTORNEY GENERAL demurred to the plea, and prayed that the prisoner might join in demurrer.

THE COUNSEL *for the prisoner* desired time to reply, or to join in demurrer, and the rather, because in *Fitz-Harris's Case* (*a*) four days were given by this court, which is some proof that it is the course of the court to allow time to plead in such cases.

THE CHIEF CLERK *of the crown office* being thereupon asked what was the custom of the court in this matter, answered, that in *criminal cases* there were precedents where, upon demurrer, time was given to join in demurrer, but never in *capital cases.*

THE COUNSEL *for the prisoner* thereupon argued, that if time was given in criminal cases, *à fortiori* it should be allowed in capital cases.

THE KING'S COUNSEL *replied*, that no instance could be given where, in capital cases, a day had been allowed to join in demurrer, because the prisoner can do nothing else; therefore where he pleads in abatement, he should always be prepared to maintain his plea. As to *Fitz-Harris's Case*, it is rather an authority against the prisoner than for him, for that was a plea to *the jurisdiction* of this court, to which there was a demurrer, and *Fitz-Harris* immediately joined in demurrer. It is true, in the present case *life* is concerned, but not so immediately; and this plea is so frivolous, that it scarce deserves an answer, it being only a pretended mistake of a letter in the prisoner's name of baptism, when there are uncontroulable authorities that it is spelt both ways; and notice was given of * this demurrer yesterday, and a copy thereof sent to each of his Counsel, so that greater indulgence hath been shewed to him than formerly to *Fitz-Harris*, or to *Lord Preston*, who upon his trial at THE OLD-BAILEY, before the *Chief Justice* HOLT, for high treason, pleaded his patent of peerage, but was denied time to produce it.

* [85]

(*a*) 1. Vent. 354. 3. St. Tr. 224. 4. St. Tr. 165. 2. Show. 163.

THE

THE KING *against* LAYER.

THE COUNSEL *for the priſoner* admitted this; but the reaſon why time was denied to produce the patent was, becauſe *Lord Preſton* pleaded, that it was dated at *St. German's*, and it would have been a diſhonour to the court to proceed in the examination of letters patents granted by the late *King James* after his abdication, becauſe every act done by him afterwards as king was abſolutely void.

THE COURT upon the whole matter held, that time was never yet given in *capital caſes* (*a*) to join in demurrer, and ſaid, that what was now offered as a plea was firſt offered as an exception to the indictment, and that the priſoner's Counſel were then ready to argue it as an exception, and why not now, when it is a plea. It is true, they have mentioned *Fitz-Harris's Caſe* as an inſtance where four days were allowed by this court for him to join in demurrer; but that is ſo far from being a caſe in point, it widely differs from the preſent caſe; for there the cauſe of delay and conteſt was between the prerogative of THE KING and the privilege of THE HOUSE OF COMMONS, which were extraordinary things, and to be well conſidered before *Fitz-Harris* could be tried; now in the preſent caſe the priſoner cannot withdraw his plea without leave of THE ATTORNEY-GENERAL, who having demurred to it, the priſoner has nothing more to do than to join in demurrer, and all the proceedings in ſuch caſes are *inſtanter*.

THE PRISONER *anſwered*, that he did not affect any unreaſonable delays, but that he was willing to withdraw his plea *in abatement*, and to plead *in chief*, though he had a joinder in demurrer ready engroſſed. He did accordingly withdraw it, and pleaded by the name in the indictment, *Chriſtopherus*.

THE PRISONER *moved for a rule*, that his wife and ſiſter might be permitted to viſit him under ſuch reſtrictions which the Court ſhould think fit. And a rule being about to be made, that his wife might come to him, being firſt ſearched, but as to his ſiſter, that it ſhould be left to the diſcretion of the keeper,

If a perſon be in cuſtody on a charge of high treaſon, the court of king's bench may, by RULE, order the gaoler to permit certain perſons named in the rule to viſit him.

IT WAS OBJECTED againſt this rule, by the Counſel for the king, that the like had never been made. It was denied to *Fitz Harris*, and only an intimation given to the keeper, that it might be expedient for his friends and relations to viſit him.

* But THE CHIEF JUSTICE ſaid, that it was true the wife of *Fitz-Harris* was denied to come to her huſband, probably becauſe ſhe had miſbehaved herſelf by throwing his plea into the court when it was not ſigned; and it was now affirmed, that there had been rules made by this court of the like nature; but if there had

* [86]

(*a*) In *capital caſes* no rule is given either to plead or to join in demurrer; but the priſoner being at the bar is obliged to anſwer immediately, for all the proceedings are *inſtanter*; and therefore capital caſes differ from other criminal caſes not capital.—NOTE *to the former edition.*

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not, yet it was in the power of the Court to make a rule to oblige the keeper to permit the priſoner's friends to come to him under proper reſtrictions.

And a rule was made accordingly for his wife to be admitted, in the preſence of the gaoler, and after being ſearched.

If an indictment be removed into the court of king's bench by *certiorari*, the *trial* muſt be on the *quarto die poſt* of the *venire facias*.

PENGELLY, *King's Serjeant*, on the fifteenth of *November*, moved the Court to appoint a time for the trial.

THE COURT. The proceſs muſt be returnable at a common day, the indictment being removed by *certiorari*; the laſt return in this Term but one is in eight days of *St. Martin*, and then the trial may be the *quarto die poſt*, which will be the twenty-firſt of *November*.

The priſoner deſired a further day.

THE COURT ſaid, that cannot be, for the jury cannot be adjourned beyond the return.

A *habeas corpus ad teſtificandum* ought not to iſſue, without an *affidavit* that the party is a *material witneſs*.

Forteſc. Rep. 396.

THE PRISONER then moved (notice having been given) for a *ſubpœna ad teſtificandum* to be directed to his witneſſes, and for an *habeas corpus ad teſtificandum* to bring up *Lord Orrery* and *Lord North and Grey*, who were then priſoners in THE TOWER for high treaſon.

THE COURT. Such writs have formerly been granted of courſe at a Judge's chambers; but the inconvenience may be ſo great, that *an affidavit* ought to be firſt produced that they are material witneſſes, otherwiſe, at ſuch a trial, under ſuch a pretence, there may be a general gaol-delivery of all priſons in the kingdom.

But SIR PHILIP YORKE, *Attorney-General*, the next day, conſented to ſuch writs without any affidavits.

THE COURT, however, made a general rule, that no *habeas corpus* of either ſide, civil or crown, ſhould be granted hereafter, without affidavit that the parties to be *ſubpœna'd* were material witneſſes, and bade the officers take it down; and the Court declared that they might, on the circumſtances of the caſe, refuſe to grant ſuch writ of *habeas corpus*.

Quære, If a defendant on an indictment of *high treaſon* is intitled to copies of papers.

THE PRISONER likewiſe moved for a rule, that he might have copies of all the papers in the keeping of THE SECRETARY OF STATE which were intended to be produced in evidence againſt him.

TO WHICH *it was anſwered*, that it was time enough for ſuch a motion.

So he was remanded to THE TOWER, and his trial ordered to be on *Wedneſday* the twenty-firſt of *November*.

A priſoner ſhall not be tried in irons.

At which day he was brought to the bar and tried, his *irons* being firſt taken off.

THE

THE JURY were called by the clerk of the crown-office, and the priſoner was deſired to except againſt as many as he thought fit, ſo far as the law allowed.

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THE PRISONER thereupon moved, that *the panel* might be called over, that he might know who appeared, and who not, which, after ſome oppoſition, was done.

A priſoner may have the whole *panel* called before he *challenges*.

THE CLERK then called over the whole panel.

THE PRISONER challenged thirty-four *peremptorily*, and two more *principally*, for ſaying in *Eſſex*, that they hoped to ſee him hanged; and he challenged four more for want of ſufficient freehold within the county, within the meaning of the ſtatute 7. & 8. *Will.* 3. c. 32. (*a*) by which it is enacted, "that they "muſt have ten pounds *per annum*;" which challenges were allowed. But, PER CURIAM, being ſervant to the king, or farming anything under the king, is no cauſe of challenge.

In treaſon, the priſoner may challenge *peremptorily* and *for cauſe*.
Co. Lit. 156.
Moor, 12.
3. Inſt. 27.
4. Hawk. P. C. c. 43 ſ. 5.

THE ATTORNEY-GENERAL then challenged eight for the king. But he is not by law obliged to ſhew any cauſe of ſuch challenge before they have gone through the panel, and the jurymen not challenged are ſworn (*b*): for if thoſe who appear are not enough to make up a jury, then thoſe eight may be ſworn.

The king may challenge without ſhewing cauſe before the panel is peruſed.
Moor, 595.
4. Hawk. P. C. ch. 45. ſ. 3.

But the jury was full without them, and now ſworn.

The firſt witneſs produced againſt the priſoner was one *Stephen Lynch*, who depoſed, that he and the priſoner did often conſult together, and propoſe methods how to ſeize THE TOWER, and the *Lord Cadogan*, the *Lord Townſhend*, and *Mr. Walpole* (*c*), and THE BANK OF ENGLAND, and to give the arms in * THE TOWER to the priſoners and others in *the Mint*, and to the mob, and likewiſe to ſeize the king and the prince; and that on the twenty-fourth day of *Auguſt* laſt the priſoner read a declaration, and gave it to him (this witneſs) to read at the ſign of *the Green-Man*, in *Laytonſtone*, in *Eſſex* (*d*), which was to be ſent all over *England*, as ſoon as they had ſeized the city of *London*; that he (this witneſs) was the perſon appointed to ſeize the *Lord Cadogan*, and that he was to have as many men as he ſhould chooſe for that enterprize; and that accordingly he (this witneſs) and the priſoner went to view that lord's houſe, to whom the priſoner pretended, that he had an authority to ſell an eſtate, &c.; and farther he depoſed, that he got ten guineas of the priſoner to defray his charges until they could put their deſigns in execution, which was to be done as ſoon as the ſoldiers, who were then encamped in *Hyde-Park*, ſhould break up; that theſe conſultations were carried on between the priſoner and this witneſs for a whole month; yet the priſoner never told him who was to be the general

An *accomplice* in high treaſon is a competent witneſs, although no ground be previouſly laid by other witneſſes to give veriſimilitude to his teſtimony.

* [87]

(*a*) See alſo 4. & 5. *Will. & Mary*, c. 24.
(*b*) See 33. *Edw.* 1. commonly called an *Ordinance for Inqueſts*, 4. Hawk. P. C. ch. 43. ſ. 2.
(*c*) Sir Robert Walpole.
(*d*) This was the *overt act* which was laid in the county of *Eſſex*.

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officer, though he went with him to the *Lord North and Grey's* houſe, but not a word ſpoken there of their ſcheme, where this witneſs was introduced by the priſoner, and received very kindly.

The next witneſs produced againſt the priſoner was a ſoldier, *Serjeant Plunket*, who depoſed, that in *July* laſt he met the priſoner in *Lincoln's-Inn Fields*, who there told him of this ſcheme, which was then in agitation, to bring in *the Pretender*, and if he, this witneſs, could procure ſome ſoldiers who were then diſbanded to liſt themſelves in *the Pretender's* ſervice, then they ſhould be able to regulate the mob upon any inſurrection, and told him, that the *Lord N. and G.* was to be their general, and that he would head the inſurrection; that the priſoner then gave him half-a-crown, and promiſed to ſend him more money to liſt men; that afterwards he received half-a-guinea of one *Jefferies*, a non juring parſon, who told him, that *Mr. Layer* was in the country, and had ſent that money to him; that in a little time afterwards he had a letter left at his lodging by the ſaid parſon, that *Mr. Layer* was come to town, and thereupon this witneſs went to him at the *Caſtle-Tavern*, in *Drury-Lane*, where *Layer* told him, that he had ſent a whole guinea by the parſon, and wondered that he had received but half, and no more, and then he the priſoner told this witneſs the whole deſign; and that ſome of the greateſt
[88] * men in the kingdom would come into the ſcheme; and though he (this witneſs) acknowledged that he could neither write or read, yet he remembered the contents of the letter which he had received three months ſince, and which one of his comrades did read to him.

The next witneſs was *Mrs. Maſon*, who depoſed, that the priſoner left a bundle of papers with her for ſafe cuſtody, which was ſealed with A HEAD; that the bundle ſo left with her was not opened until the meſſenger ſeized it at her lodging; and that the bundle now produced in court is the ſame which was left with her by the priſoner, ſhe having marked it in a particular manner; and the meſſenger depoſed, that it is the ſame bundle he ſeized at her lodging.

Then the meſſengers who apprehended the priſoner depoſed, that there were two fuzees, two caſes of piſtols, two ſwords, two muſkets, and about forty or fifty cartages of powder and bullets in the priſoner's houſe, made ready for any enterpriſe; and one *Colonel Huſke* depoſed, that the fuzees had ſuch wide bores that they would ſwallow a muſket-ball, and ſerve very well for that purpoſe.

Then *Mr. Squire*, the meſſenger, and others, made oath of the manner of the priſoner's eſcape from him out of his (the meſſenger's) houſe, and of his being retaken in *Saint George's Fields*, in *Southwark*.

Mrs. Maſon farther depoſed, that ſhe had received ſeveral letters by the order of the priſoner, which were directed to one *Mr. Fountaine*, which letters were delivered by her to the priſoner, and opened

opened and read by him; and ſhe being now aſked whether ſhe could read, ſhe replied ſhe could not, but that her landlady told her to whom thoſe letters were directed. THE KING *againſt* LAYER.

Then one *Mr. D'Oyley* depoſed, that ſome papers which were in that bundle were, as he believed, of the priſoner's hand-writing; for that he, this witneſs, was acquainted with his hand, he being his clerk about fourteen years ſince, and that he had received a letter from the priſoner about five years paſt, which he believed was written by him.

The papers were produced to be read.

THE COUNSEL *for the priſoner* oppoſed their being read, becauſe *ſimilitude of hands* is no evidence; and ſome caſes were cited to prove that matter.

Papers found in the cuſtody of a perſon may be read in evidence againſt him on an indictment for RIGHTREASON, although they are not in his *hand-writing*.

But this was over-ruled by THE COURT, who were of opinion, that if theſe papers were not written by the priſoner, yet being found in his cuſtody, they ought to be read; and ſo it was reſolved in *Lord Preſton's Caſe (a)*.

* Then the papers were delivered to the clerk of the crown, and he read a ſcheme, conſiſting of fourteen articles, how to ſurprize THE TOWER, how to provide arms, where to rendezvous, and ſeveral other articles; &c. Then he read ten notes ſigned by *the Pretender* himſelf "JA. *Rex*," and thoſe were to raiſe money for this undertaking.

* [89]

The meaning of papers found in the cuſtody of a perſon indicted for treaſon may be explained by other papers on the ſame ſubject.

Then ſeveral letters were read, all written by *Sir William Ellis*, who is ſecretary to *the Pretender*, and ſubſcribed "*Euſtace Jones*," and directed to *Mr. Fountaine*, which letters were deciphered by ſome other papers found in this bundle, *viz.* that paragraph "to "provide able workmen," was explained "to provide able "ſoldiers," and "the ableſt hands of *Barbara Smith*" was explained "the army;" that "*Euſtace Jones*" is "*Sir William* "*Ellis*," and "*Mr. Atkins*" is "*the Pretender*;" that "*Mr.* "*Burford*" is "*the Earl of Or—y*," and "*Mr. Simonds*" is "*the Lord N. and G—y.*"

A confeſſion made at *the Cockpit* by a priſoner charged with treaſon may be given in evidence on his trial.

THEN *Mr. Stanian* and *Mr. Delehay*, who were preſent when the priſoner was examined before the Council at THE COCKPIT, offered to give evidence of the priſoner's confeſſion there.

But this was oppoſed by his Counſel, for that he had not ſigned any confeſſion, and probably ſome unguarded words might drop from him at that time which might amount to a crime if given in evidence.

THE COURT thereupon declared, that it was no evidence, but that the witneſſes ſhould be examined as to what he confeſſed there, as a corroborating circumſtance of the evidence already given.

(a) 6. State Trials, 279.—See alſo Foſter, 198. and Burr. Rep. 644.

THE KING *against* LAYER.

Thoſe witneſſes being ſworn, depoſed, that the priſoner confeſſed he had been at *Rome*, and that he was kindly received at THE PRETENDER's court, and that he prayed to have credentials to his friends in *England*, which was denied; but that he obtained leave that THE PRETENDER and his ſpouſe would ſtand godfather and godmother to the priſoner's child; and that, after he returned into *England*, he applied himſelf to the *Earl of Or—y* to ſtand proxy for THE PRETENDER, which he refuſed; then he made application to the *Lord N— and G—y*, who, with the late *Dutcheſs of Or—d*, ſtood proxies.

They farther depoſed, that being aſked what he knew of THE PRETENDER's declaration, he anſwered, that he only knew ſome heads of it.

A WOMAN was then produced, who depoſed, that ſhe ſaw the priſoner at *Rome* in *July* laſt was twelvemonth, and that he was kindly received at THE PRETENDER's court.

*[90]

* This being the ſubſtance of the evidence againſt the priſoner, he now made his defence.

The defendant on a trial for high treaſon may call witneſſes to diſcredit the teſtimony of the witneſſes on the part of the crown.

AND FIRST, the *Lord North and Grey* ſaid, that he never ſaw *Stephen Lynch*, but only when he came to his houſe with the now priſoner, where he ſtayed one night, and no longer, and that he found by his diſcourſe, that *Lynch* was a ſcandalous fellow; and coming afterwards to his houſe when the priſoner was taken, he was forbid to come in.

There were ſeveral other witneſſes who gave an infamous character of *Lynch*, *Plunkett*, and *Maſon* (*viz.*), that they would ſay and ſwear any thing, and that they would hang a man for twopence. And two of the witneſſes for the priſoner ſwore poſitively, that *Lynch* told them, that he had got ſome money from the baſtard-daughter of one of the firſt men in *England*. Another witneſs depoſed, that *Lynch* told him, that he was unfortunately brought in to impeach the priſoner, and that he had rather fight any ſix men in *London* than do it; but that being engaged in it, he muſt go through, and that he had nothing to ſay againſt any perſon but againſt the priſoner, and nothing againſt him but talk. And another witneſs depoſed, that *Plunkett* told her that the money he received of the priſoner was rather for charity than for any ſervice done to him formerly, and that he (*Plunkett*) could hardly make the priſoner remember their former acquaintance.

Papers in the priſoner's hand-writing may be compared with other papers found in his cuſtody.

Then two witneſſes were produced, who depoſed, that the papers which were ſworn by *Mr. D'Oyley* to be the priſoner's hand-writing were not ſo. Then *Mr. Paxton* produced a paper found in the bundle, which the priſoner's witneſſes owned to be his hand-writing; and this was compared with the other papers which they had ſworn not to be of his hand-writing.

Whereupon

Whereupon the priſoner obſerved to the jury, that *ſimilitude of hands* was a very weak evidence; and ſaid, if ſuch evidence, and ſuch witneſſes, ſhould be allowed it was impoſſible for any man to be ſafe.

THE KING *againſt* LAYER.

* [91]

SIR PHILIP YORKE, *Attorney-General*, replied, ſetting forth the greatneſs of the offence, and the plainneſs of the proof, and made ſeveral remarks on the evidence on both ſides, and ſaid, that the indictment was proved beyond contradiction; and that the witneſſes produced to give a character of *Lynch*, &c. wanted witneſſes to their own characters; and that one of them (*viz. James Darcy*) had ſworn he knew the priſoner * here laſt winter, when he did not come into *England* till laſt *April*. That the witneſſes ſeemed to be people raked out of THE MINT for a certain purpoſe, but that the witneſſes for the king were perſons of credit, and to prove them ſo ſeveral credible perſons were called: the firſt was *a vintner*, who depoſed, that he had known *Lynch* about four months, in all which time he was frequently at his houſe, and had behaved himſelf very honeſtly; and being aſked whether *Lynch* owed him any money, he replied, that he did owe him 8l. 15s. 6d. which he paid not long ſince. There were likewiſe ſeveral officers called to *Plunkett*'s character.

On a trial of high treaſon, if the defendant calls witneſſes to impeach the character of the witneſſes for the crown, other witneſſes may be called on the part of the proſecution to ſupport their credit.

PRATT, *Chief Juſtice*, ſummed up the evidence on both ſides, and concluded with directing the jury, that if they believed there was an *overt-act* of treaſon in the county of *Eſſex*, and that it was proved by *Lynch*, and confirmed by the confeſſion of the priſoner; and if there was any overt-act in another (*a*) county, as his liſting or employing any to liſt or engage men in THE PRETENDER'S ſervice, they ſhould find the priſoner *guilty*.

In high treaſon, an *overt act* muſt be proved in the county in which the indictment is laid.

S. C. 6. St. Tr. 292.

2. Hawk. P. C. ch. 46. ſ. 34.

And they being gone from the bar, returned in the ſpace of half-an-hour, and brought in their verdict "Guilty."

THE PRISONER was then remanded to THE TOWER, and ordered to be brought again to the bar on the *Tueſday* following, being the twenty-ſeventh day of *November*, which was done.

The irons of a perſon convicted of treaſon ſhall be taken off when he is brought up to receive judgment.

HIS COUNSEL then moved again, that his irons might be ſtruck off, which, not being oppoſed, was likewiſe done.

THE COURT directed, that if they had anything to offer in arreſt of judgment, this was the proper time, and they ſhould be heard.

On a perſon's being brought up to receive ſentence on a conviction of high treaſon, the Court will allow the indictment to be read to him preparatory to a motion in arreſt of judgment; but they will not allow the *venire facias* to be read.

(*a*) On an indictment for high treaſon, in conſpiring the death of the king, if ſeveral overt-acts are laid, and ſome are proved by one witneſs to be done in the county where the party is indicted, and others are proved by another witneſs to have been committed in a different county, that evidence is ſufficient to maintain the indictment; they are two witneſſes of the ſame ſpecies of treaſon within the meaning of the law. Kelynge, 51. Staffold's Trial. Five Jeſuits Trial.—NOTE *to former edition.*

Thereupon

THE KING *against* LATER.

Thereupon they moved, that the *venire facias* for ſummoning the jury might be read.

This was oppoſed by the King's Counſel as a thing without precedent; therefore, if it ſhould be now allowed, it might be a precedent hereafter; not that they feared to have it read, but would not make a precedent to give the courts any trouble both now and hereafter; and the rather, becauſe what was now deſired did not concern the merits of the cauſe, but was a collateral point, and of no great weight.

THE COURT ſaid, they would not deny the priſoner anything to which he was entitled by law, and which might do him any ſervice in his preſent circumſtances; but that if what was now (*a*) deſired was never yet granted to the greateſt perſons under the like misfortunes, there could be no reaſon to grant it to him.

*[92] * It is true, the indictment is a thing on which the merits of the cauſe depend, and therefore the Court admitted it to be read to the priſoner, but not the *venire facias*, for that was never yet allowed.

If a *venire facias* on an indictment of treaſon be returnable "in eight days "of St. *Martin*," it cannot be objected in arreſt of judgment, that the defendant was not tried on the day of its return, or the *venire facias* continued to the day of trial.

33. *Hen.* 6. 45. 5, 6. 35, 36 Rookwood's Caſe, Yelv. 204. Cro. Jac. 257. 284. 357. Roll. Abr. 822. pl 4. 6. Dalt. J. 415. 2 Inſt. 125. Bro. "Niſi "Prius," 32.

The objection to it, if it had been read, was, that it is returnable in eight days of *St. Martin*, and the priſoner not being tried on that day, in ſuch caſe, if it is not continued to the day of trial, they are out of court, and ſo this jury had no more authority to try the priſoner than thoſe who were never returned on the panel, becauſe the *diſcontinuance* makes the trial erroneous, for wherever there is *a diſcontinuance* of any return, the whole proceedings are wrong.

THE COURT aſked the clerk of the crown, how the practice was in ſuch caſes.

The clerk of the crown anſwered, that it was as in the preſent caſe, and that he never ſaw a *venire facias* continued, becauſe the jury are always ſuppoſed to be in court till the four days are paſt; and there never was any continuance within the four days.

THE COUNSEL *for the priſoner* replied, that it might be ſo in civil or criminal caſes, but not in capital cauſes, becauſe in ſuch the law requires the utmoſt certainty.

CURIA *contra*. There is a day of appearance on the *venire facias*, and the proceedings are like thoſe on an original. In caſe the jury do not appear on the *venire facias*, ſo that a *diſtringas* is awarded, it always bears *teſte* the *quarto die poſt*, after the return of the *venire facias*. The jury is never bound to appear till the *quarto die poſt*; they may adjourn the jury over to any day before the next return in the Term; but no entry is ever made on record of ſuch adjournment, for the proceedings are entered to be at the

(*a*) The priſoner, at common law, was not entitled to demand anything to be read but the indictment, and 7. *Will.* 3. c. 3. hath made no alteration as to the proceſs. See Foſt. Cr. Law, 221.—NOTE *in former edition.*

return

return of the writ. *Rookwood's Case* is ſo; for on a commiſſion of *oyer* and *terminer* there is no *quarto die poſt*, nor day of appearance, but the day of the return of the writ. And the Court was of opinion, that if this was a good objection, then many proceedings in the like caſes would be ſet aſide.

THE KING against BAYER.

THE PRISONER then obſerved, that all the proof againſt him at the trial was a deſign to levy war, but that it never was actually levied; and that a deſign or intention to levy war is not treaſon (*a*). It is true, an intention to kill the king is treaſon, if proved by ſome overt act; and here the indictment is for a deſign to kill the king; and the overt-act which they would apply to it is a deſign to levy war, which, he ſaid, was not an overt-act of his deſign to kill the king.

An intention to levy war is an *overt act* of a deſign to kill the king.

But THE COURT was not of that opinion. This very point being ſettled above a hundred times ever ſince the caſe of the Regicides, ſo lately as in the caſe of *The King v. Gordon*, in the firſt year of *George the Firſt*, and ought not to be permitted to be diſputed, where an intention to levy war was adjudged to be an overt-act of a deſign to kill the king.

THE COUNSEL *for the priſoner* anſwered, that in *Francia's Caſe* (*b*) it was only argued, whether an intention to levy war ſhould be given in evidence as an overt-act of an intention to kill the king, which is not the preſent caſe, becauſe now that very matter is moved in arreſt of judgment, where all the facts muſt be laid upon it that poſſibly may be laid; which was not requiſite in *Francia's Caſe*, becauſe he was acquitted.

But this objection was over-ruled.

[93]

The next thing in arreſt of judgment was, that the *overt-act* in *Eſſex* was not well laid in this indictment, for it was, that he (the priſoner) "*malitioſè et proditoriè publicavit quoddam ſcriptum*, "*&c. continent. et purportant*" (*inter alia*) "an exhortation, "incitement, and promiſes of rewards, &c." when the very words, and not the purport of them, ought to be laid in the indictment; as it was reſolved in *Doctor Sacheverel's Caſe* (*c*), that in all accuſations, the words ſuppoſed to be criminal ought to be inſerted (*d*).

An indictment for high treaſon, ſtating, as an overt act of compaſſing the king's death, that he defendant, at ſuch a place, "maliciouſly and traiterouſly did publiſh a certain malicious, ſeditious, and traiterous writing, containing and purporting (among other

CURIA *contra*. The words themſelves need not be ſet out; it is ſufficient to ſhew the ſubſtance or effect of them.

And by EYRE, *Juſtice*, the opinion of the Judges in *Doctor Sacheverel's Caſe* was a great ſurprize to WESTMINSTER HALL, being never ſo adjudged in any book; and HOLT, *Chief Juſtice*, held, that an indictment ſpecifying the words or the ſubſtance was

"things) an exhortation and incitement to the king's ſubjects to levy war within the realm, &c." is good, without ſtating the *very words* of the publication. Ld. Raym. 256. Com. Rep. 43. pl. 2. 12. Mod. 139. 5. Mod. 343. 2. Salk. 513. Comb. 459. Carth. 421.

(*a*)
(*b*) 6. State Trials, 58.
(*c*) 5. St. Tr. 645.
(*d*) Co. Lit. 303. a.

good;

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good (*a*); ſo that opinion to me ſeems wrong, being without any foundation.

And it was adjudged by THE COURT, that if but one overt-act is well laid, judgment muſt paſs againſt the defendant: ſo held in *Rookwood's Caſe* (*b*).

THE COUNSEL *for the king* argued, that in capital caſes it is ſufficient to lay the purport of the words in the indictment; and that it was the opinion of the late *Chief Juſtice* HOLT, that in all caſes for ſcandalous words it was the ſafeſt way to lay the purport of them in the action, becauſe then the ſpecial matter might be given in evidence. It is true, in criminal caſes the very words ought to be laid in the indictment, but not in capital caſes; for ſuppoſe a man ſhould get upon *Charing-Croſs*, and read a declaration for THE PRETENDER, this would be treaſon, though the very words could not be laid in the indictment.

THE COUNSEL *for the priſoner* admitted all this, becauſe the proclaiming THE PRETENDER would be high treaſon; but in the preſent caſe, the priſoner only gave a paper to *Lynch* to read, which is not a publication of that paper.

THE COURT. This paper is a ſcandalous and treaſonable libel, which the Counſel for the priſoner at his trial called *a ballad*, and ſaid, that it would amount to no higher a crime than to the publiſhing *a libel*, for which they ought to have been reproved at that time, but it was paſſed over, becauſe it ſhould not be ſaid but that they had all manner of indulgence.

And now being aſked, whether they had any thing more to ſay in arreſt, they replied they had not.

THE PRISONER then ſaid, that he had ſeveral accounts to make up with ſeveral perſons, and particularly with *Lord Londonderry*, and that he hoped he might have a little time allowed for that purpoſe, becauſe he would do juſtice to all men; and that he had a greater account to give to his Maker, and hoped that he might have ſome reaſonable time allowed in that reſpect; and then if the king was not pleaſed to continue his life, he would convince the world, that he dared to die like a gentleman and a chriſtian, and to appear before that juſt judicature, where he hoped to have a double portion of that juſtice which had been denied to him here.

The form of paſſing ſentence on a perſon convicted of HIGH TREASON.

PRATT, *Chief Juſtice*, then gave ſentence thus: *Chriſtopher Layer*, you are convicted of high treaſon, and on a very plain proof. You had Counſel of your own chooſing, and a jury of your own admitting, for you excepted againſt thirty-four only. The facts which were proved againſt you were, your frequently correſpond-

(*a*) Trinity Term, 8. *Will.* 3. Rex v. Griepe, Ld. Ray. 256.—See alſo Haley's Caſe, Mich. Term, 30. *Car.* 2.

(*b*) See Foſter C. L. 245.

ing

ing with THE PRETENDER, and a treaſonable ſcheme of your own hand-writing. Your confeſſion before the Council ſhews, that THE TOWER of *London* was to be ſeized, and alſo THE BANK OF ENGLAND, and the general of the army, * and other the king's friends, and likewiſe his royal perſon, and all the royal family, and that a declaration was to be ſent to alarm all parts of the kingdom, and all this was to be done to a king who never offered the leaſt wrong to any of his ſubjects, but who takes all poſſible care to maintain the laws, and to preſerve the rights and liberties of the people, which laws he makes the meaſure of his government, and you have endeavoured to ſet a popiſh Pretender on the throne, who would introduce deſpotic and arbitrary power; and all this done by you who are a profeſſor of the law, and who could not be a ſtranger to the happineſs of our preſent conſtitution. But now you ſtand for judgment, which is, "That you be carried from "hence to the place from whence you came, and from thence "you ſhall be drawn to the place of execution, and there to "hang, but not till you are dead, but be cut down alive, and "your entrails cut out, and burnt before you, and your head to be "cut off, and your body divided into quarters, and both your head "and quarters to be diſpoſed as his majeſty ſhall think fit."

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* [94]

THE PRISONER deſired, that his wife and ſiſter might have leave to come to him, and that *Mr. Morgan* and *Mr. Jones*, two clergymen, might be admitted to him. But *Mr. Jones* not being in town, he choſe another, and had a rule for that purpoſe.

The friends of a convicted traitor allowed to viſit him.

On *Wedneſday*, the twenty-eighth *November*, THE ATTORNEY and SOLICITOR GENERAL moved for a rule for his execution, and that the Court would appoint a time and place for that purpoſe; and ſaid, that the chief deſign of executing ſuch criminals was to be an example to others not to offend in the like manner, and to deter them from committing treaſon; and therefore they moved, that the execution might be in *Middleſex*, eſpecially ſince overt-acts were proved in *Middleſex*, though the fact was done in *Eſſex*; and ſaid, that there were many precedents for executing criminals in ſuch places as this Court ſhould think proper; and that the reaſon was ſtronger in caſe of high treaſon than it would be for felony, becauſe the king has a greater property by the judgment in the body of a traitor than of a felon, he having power to diſpoſe of the four quarters as he pleaſes.

If an indictment of treaſon be found, under a ſpecial commiſſion, in the county of *Eſſex*, and removed for trial into the court of king's bench, the Court, after conviction, may order the priſoner to be executed on a particular day in the county of *Middleſex*.

CURIA. It ſeems reaſonable, for all puniſhments are intended for example; and an execution muſt be the greater example where there is the greateſt concourſe of people.

THE COURT aſked the clerk of the crown, if he knew any ſuch precedents, who replied, that *Doctor Lopez*, convicted of treaſon in *Queen Elizabeth*'s time, in *Berkſhire*, was executed in *Devon*: ſo *Lord Audley*, in *Charles the Firſt*'s time, was executed in *Middleſex* for a fact committed in *Wiltſhire*: ſo *Dale*, in *King James the Second*'s time, was convicted of a felony in *Berkſhire*,

THE KING *against* LAYER.

Berkſhire, but executed in *Devon*. Two other late precedents were mentioned; and that it was daily experience for a perſon convicted of perjury in *Middleſex* to ſtand in the pillory at the *Royal Exchange*.

So a rule was made to the *lieutenant of the Tower* to deliver the priſoner to the ſheriffs of *London and Middleſex*, and another rule to the ſaid ſheriffs to execute him on *Wedneſday*, *December* the twelfth, at *Tyburn*.

* [95]

A clergyman charged with treaſon, though bailed, ſhall not be permitted to attend a convicted traitor previous to his execution.

THE KING'S COUNSEL then moved the Court to alter the rule made the day before, for *Mr. Morgan* the clergyman, * to attend the priſoner, for that he was taken into cuſtody upon ſuſpicion of treaſon, and had given bond to appear in court this day.

THE COURT anſwered, that any clergyman ſhould be admitted to the priſoner who was a perſon of known honeſty, integrity, and learning, but not ſuch who might harden him in his iniquity in his laſt moments; ſo two more clergymen were joined in the rule.

If a rule for the execution of a traitor be countermanded by a reprieve, the convict muſt be again brought up, and a new rule made for his execution.

Afterwards, and on the very day before he was to be executed, he had a reprieve by his majeſty's warrant, and ſo continued to be reprieved until *Friday* the eighth of *February*, when THE ATTORNEY-GENERAL moved for a rule to be made on the lieutenant of THE TOWER to bring up *Mr. Layer*, to know what he could ſay *quare executionem non*, *&c.* there being ſome (*a*) opinions, that he could not be executed by virtue of any warrant ſigned by the king; but that a new rule muſt be made in the court of king's bench for his execution.

The priſoner being accordingly brought up on *Monday* the eleventh of *February*, and having nothing to ſay in bar of execution,

(*a*) HOLT, *Chief Juſtice*, cited *Knightly's Caſe*, who was indicted for high treaſon in conſpiring the aſſaſſination of king *William the Third*, and being arraigned at THE BAR in the king's bench confeſſed the indictment, and judgment of death was pronounced againſt him in Eaſter Term, and execution was countermanded, ſo that Trinity Term paſſed, and then in the long Vacation they had a deſign to execute it; and upon that, ALL THE JUDGES OF ENGLAND met to conſider what could be done; and it was reſolved by all, that in regard a Term had intervened without execution done, it could not be awarded without bringing *Knightly* to the bar; and HOLT, *Chief Juſtice*, ſaid, that it would have been the ſame thing if Trinity Term had not been paſſed, but only begun: ſo *Knightly* was impriſoned until Michaelmas Term; and in the mean time he obtained a pardon. *Ld. Raym.* 482, 483. *Doctor Hayes* was convicted at the bar of the court of king's bench of high treaſon, in adhering to, aiding, and correſponding with, the king's enemies. Trin. 31. *Geo.* 2. Burr. Rep. 643. He was ordered for execution upon Wedneſday, July 12, Trinity Vacation, 1758. Burr Rep. 651. The priſoner being reprieved by the king before the day of execution, the better opinion was, that he could not be executed without a new rule of court of king's bench; but in the mean time he obtained his pardon, which he pleaded in the king's bench in Mich. Term, 1758.—NOTE *to the former edition.*

MR.

MR. ATTORNEY GENERAL desired a rule might be made for awarding proper writs for his execution on *Wedneſday*, the twenty-ſeventh *March*, which was accordingly granted; before which day he was further reprieved to the third day of *May*; and afterwards another rule was made to execute him on the ſeventeenth day of the ſaid month of *May*, which was done accordingly at *Tyburn*. THE KING *againſt* LAYER.

MICHAELMAS

MICHAELMAS TERM,

The Ninth of George the First,

IN

The King's Bench.

Sir John Pratt, *Knt. Chief Juſtice.*

Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.*
Sir John Forteſcue Aland, *Knt.* } *Juſtices.*

Sir Robert Raymond, *Knt. Attorney General.*
Sir Philip Yorke, *Knt. Solicitor General.*

The King *againſt* Seymour Richmond. Caſe 61.

An *attachment* lies againſt a town-clerk for attaching and ſelling goods brought improperly into the market of the town, inſtead of taking bail from the offender to anſwer the charge.

AN ATTACHMENT was granted laſt Term againſt the defendant *Richmond*, unleſs cauſe were ſhewn, &c. for that he being TOWN-CLERK of *Wallingford* had attached ſo much meal in the market there in ſacks, and had ſold the ſame under colour of the ſaid attachment, when the owner would have given an appearance to the ſuit for which his goods were thus attached; and upon complaint made by the ſaid owner to the mayor and burgeſſes there, he, the ſaid defendant, was ordered to deliver the meal to the owner, upon giving an appearance as aforeſaid; but the defendant refuſed to deliver the meal, and ſaid, that the owner ſhould never have his meal again.

And now he ſhewed this cauſe why *an attachment* ſhould not go againſt him, *viz.* he made an affidavit, that he was town-clerk of that borough, and that when he made out the order to attach the meal he thought it a good order; and that if the mayor and burgeſſes made any order for the defendant to deliver the meal to the owner, ſuch order was only verbal, and not in writing, and that a verbal order could not ſuperſede one in writing, and that if he had offered any contempt to ſuch verbal order, he ought to be * puniſhed there, where the ſuppoſed offence was done, and not by attachment.

THE KING *againſt* SEYMOUR RICHMOND.

TO WHICH *it was anſwered*, that where an officer of an inferior court abuſes the proceſs of that court, to the oppreſſion of any perſon, he may be puniſhed by this court; and that the defendant having iſſued out *an attachment* as the very firſt proceſs, it is altogether irregular; and then afterwards to make uſe of it as an execution is ſtill worſe, and an apparent oppreſſion; and his having ſold the meal by virtue of that attachment, contrary to the expreſs order of the mayor, and his declaring that the owner ſhould never have it again, ſhews he had a deſign to oppreſs him. It is true, he ſwears that he had only a verbal order to deliver the meal; but yet that can be no excuſe to him, becauſe he is the very perſon (being the town-clerk) who ſhould have entered that order in writing.

THE COURT. The rule is for an attachment *niſi cauſa, &c.* and the ground of that rule is for oppreſſing a ſtranger; and if this is not denied, as it is not by the affidavit, then the defendant is guilty of this oppreſſion.

So the rule was made abſolute.

Caſe 62. The King *againſt* The Earl of Orrery, Lord North and Grey, Biſhop of Rocheſter, Kelly, and Cockran, Priſoners in the Tower.

If a ſtatute, as 9. *Geo.* 1. c. 1. ſuſpend the *Habeas Corpus Act* for a certain time, and direct, "that no Judge "or Juſtice ſhall "bail or try any "priſoner with-"out an order "from the "king," A PRISONER in THE TOWER, committed by a ſecretary of ſtate for high treaſon ſpecially expreſſed in the warrant, cannot enter his petition on the firſt day of the enſuing Term, under the *Habeas Corpus Act*, to be tried the ſame Term; for by ſuch act 2a Mod. 66.

BY the *Habeas Corpus Act*, 31. *Car.* 2. c. 2. ſ. 7. it is provided, that perſons committed for "*treaſon* or *felony* ſpecially expreſſed in the warrant, ſhall, upon prayer in open court, in the "firſt week of the next Term, be brought to their trial, and if "not indicted the next Term, then, upon motion on the laſt day "of that Term, they ſhall be bailed, unleſs it appear on oath, that "the king's witneſſes are not ready; and if on ſuch prayer they "are not indicted or tried the ſecond Term after commitment, "they ſhall be diſcharged; and the Judges refuſing to grant a "*habeas corpus* ſhall forfeit five hundred pounds, and the officer "refuſing to obey it a hundred pounds."

By the ſtatute 9. *Geo.* 1. c. 1. the *Habeas Corpus Act* was at this time ſuſpended for a time.

One *Kelly*, a priſoner in THE TOWER for *high treaſon*, moved for leave to enter his prayer purſuant to THE HABEAS CORPUS ACT.

The ſame motion was made in behalf of *Lord Orrery* and *Lord North and Grey*, who were committed by a ſecretary of ſtate for high treaſon.

And the *Caſe of Bernardi (a)* was mentioned, to ſhew, that this was a reaſonable motion, becauſe they might be intitled to the benefit of ſuſpenſion the power of the king's bench is ſuſpended.—S. C. Forteſ. 101.

(*a*) 10. State Trials Append. 67.

benefit.

benefit of the act, if it ſhould ever be revived; for *Bernardi* was held to be out of the act, becauſe he did not enter his prayer the firſt * week of the Term after his commitment, apprehending that he was not obliged to do it, becauſe the act was then ſuſpended, as it is now. And it was adjudged in the caſe of *the Earl of Ayleſbury* (*a*), that a perſon lapſing the firſt Term after commitment can never after take benefit of that act; for it is in nature of a condition precedent required of them to make ſuch prayer: and for this omiſſion *the Earl* was adjudged precluded by the ſtatute; though he was afterwards bailed by virtue of the diſcretionary power in the Court (*b*). Application muſt be made to that court which has power of trial; for which reaſon, in *Leaſon's Caſe* (*c*), who was committed to *Surrey Gaol* for felony, and moved this court to enter his prayer, the motion was rejected; becauſe this court not being the proper court for the trial of priſoners in *Surrey Gaol*, the conſequence of admitting ſuch prayers would be, to bring all felons, burglars, and other criminals, to be tried in this court (*d*).

THE LIKE MOTION was made in behalf of the *Biſhop of Rocheſter*; and it was farther urged by his Counſel, that THE HABEAS CORPUS ACT was not ſuſpended, becauſe the words of the act of ſuſpenſion were, "That no Judge or Juſtices ſhall bail or try, &c. without "order from his majeſty's privy-council, ſigned by ſix privy-"councillors;" and this Court is not (*e*) reſtrained by theſe words "Judges or Juſtices;" for the power and juriſdiction thereof cannot be taken away but by plain and poſitive words expreſſing the ſame (*f*); and it was ſaid, that, notwithſtanding this act of ſuſpenſion, THE LORD CHANCELLOR for the time being might bail ſuch priſoners, for he was not reſtrained by theſe words "Judge or Juſtice, &c." This court by its original juriſdiction is inveſted with an ordinary and extraordinary power, which cannot be taken away by implication in any ſtatute (*g*). It has likewiſe a compulſory power by virtue of THE HABEAS CORPUS ACT, which commands this court to bail perſons, &c. which power ſtill ſubſiſts, notwithſtanding the ſuſpenſion; for theſe words, "no Judge or Juſtice ſhall bail or try," ſhall not include ſo high a judicature as this court; and this is agreeable to the uſual conſtruction of other acts of parliament; therefore that ſtatute which deprives a man of his liberty ſhall not have ſo favourable a con-

(*a*) 1. Salk. 103. 3. Vin. Abr. 518. 521. 12. Mod. 117. Comb. 421.

(*b*)

(*c*) Rex v. Leaſon and Edwards, 1. Ld. Ray. 61. Same point, Rex v. Yates, 1. Show. 191.

(*d*) The priſoners made the ſame application on 7 Sept. 1722 to the Judges at the Old Bailey; but the Court rejected the motion, as being againſt conſtant experience, and without a ſingle precedent to maintain it; for THE TOWER, to which they were committed, is no part of the gaol of NEWGATE, to the delivery of which gaol alone their commiſſions extended; and they held, that if they had even been in NEWGATE, and the treaſon was committed in *Surry*, or any other county, no prayer could be allowed. Fott. Rep. 101. 103.

(*e*) It was expreſsly adjudged to be within the act a little afterwards in this Term, The King v. the Biſhop of Rocheſter.

(*f*) 4. Inſt. 71.

(*g*)

THE KING *against* THE EARL OF ORRERY, LORD NORTH AND GREY, BISHOP OF ROCHESTER, KELLY, AND COCKRAN, PRISONERS IN THE TOWER.

ſtruction as other acts of parliament. And to induce the Court to be of this opinion, ſome late caſes were mentioned where perſons were bailed during former ſuſpenſions of this act, *viz.* the caſe of *Lord Ayleſbury* (*a*), and the caſe of *Fitzpatrick* (*b*), and the caſe of *Sir William Windham* (*c*). Beſides, there is ſufficient matter to ſatisfy the words of the ſuſpending act without extending them to the juriſdiction of this court; and that is by reſtraining the Juſtices of *oyer* and *terminer* and gaol-delivery, and Juſtices of *niſi prius*, from bailing or trying any man committed for treaſon; ſo that it ſhall not, by any conſtruction, relate to this court.

PENGELLEY, *Serjeant*, argued for the king, that if this court admits the prayer, he feared the conſequence would be, that they muſt be bailed; that if this motion ſhould be granted by the diſcretionary power of this court, then ſome extraordinary circumſtance ought to be ſhewed to induce the Court to grant it, in a caſe of high treaſon; but there is no pretence to ſuch matter; they only rely upon the words in the act itſelf, as not reſtraining this court to bail perſons; the words being, "That no Judge or Juſtice, &c. * [98] "ſhall bail, &c." which words, as they would have them, do * not extend to this court; but certainly this muſt be a miſtake, becauſe before the act of ſuſpenſion was made, no Judge or Juſtice could bail for high treaſon; therefore thoſe words muſt relate to this court, which is compoſed of Judges. Now if this court is not reſtrained, the act of ſuſpenſion will be eluded, for ſome judicature was intended to be reſtrained (*d*), and if not this court, then it can be no other, becauſe a Judge or Juſtice, before this act was made, could not bail (as hath been obſerved) for high treaſon; ſo that it was made purpoſely to reſtrain this court. The *Lord Ayleſbury's Caſe* is not parallel to this caſe, becauſe the *habeas corpus* was ſuſpended only to him and them who were committed "on ſuſpicion of treaſon or treaſonable practices," but not to them who were committed expreſsly for "high treaſon." So that it appears by a very plain indication, that the intent of the Legiſlature was to reſtrain this court, and if ſo, it is as good as if reſtrained by poſitive words. Now that it was ſo intended appears by the very words of the act of ſuſpenſion, "No Judge or Juſtice ſhall bail, &c." which words reſtrain this court, and alſo Juſtices of *oyer* and *terminer*; for if the Judges are reſtrained, the court muſt be ſo too, becauſe it is compoſed of Judges; and my *Lord Coke* (*e*) tells us, that if the king ſat here in perſon, juſtice muſt be adminiſtered by the Judges. It is to be obſerved, that this act is penned in the

(*a*) 1. Salk. 103. Comb. 421. 12. Mod. 66. 117.

(*b*)

(*c*) Stra. 2. 3. Vin. Abr. 515.

(*d*) In the caſe of Rex *v.* Bernardi, Michaelmas Term, 1. *Geo.* 1. it was adjudged, that the firſt Term after the expiration of a ſuſpenſion act is the firſt Term after commitment within the meaning of the ſtatute 31. *Car.* 2. c. 2. for that is the firſt Term in which the priſoner is enabled to make his prayer; and that then he has a right to make it, 1. Strange, 143.; and if he omit ſo to do, he loſes the benefit of the act. Lord Ayleſbury's Caſe, 1. Salk. 104.

(*e*) 4. Inſt. 71.

moſt

THE KING *againſt* THE EARL OF ORRERY, AND OTHERS.

moſt general words that could be thought on, and that the law-makers could have no other intention than to reſtrain the Judges from bailing either in or out of court; and this ſeems to be the plaineſt conſtruction of the act; therefore if this court can neither bail the priſoners, or try them, it will be to no purpoſe to grant a *habeas corpus*.

So it was denied (*a*); and the rather, becauſe it was denied in *Layer's Caſe* (*b*); for the Court would not try him until they had an order from the king, as the act directs.

(*a*) Leave was given to enter their prayer.—NOTE *to former edition.*

(*b*) *Ante*, 82.

MICHAELMAS TERM,

The Ninth of George the Firſt,

IN

The King's Bench.

Sir John Pratt, *Knt. Chief Juſtice.*

Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.*
Sir John Forteſcue Aland, *Knt.* } *Juſtices.*

Sir Robert Raymond, *Knt. Attorney General.*
Sir Philip Yorke, *Knt. Solicitor General.*

The King *againſt* Street and Stroud.

Caſe 63.

UPON A MOTION for *a mandamus* to the old churchwardens of the pariſh of *C.* to deliver the pariſh-books to the new churchwardens, &c.

A mandamus will not lie to the old churchwardens, to deliver the pariſh books to their ſucceſſors.

A RULE was made for them to ſhew cauſe on ſuch day, why *a mandamus* * ſhould not go.

* [99]

At which day it was ſhewed for cauſe, that this was a new motion, and the like had never been made in this court, and that the late *Chief Juſtice* HOLT had denied to grant it to a ſteward of a court-baron.

Sef. Caſ. 229. pl. 186, S.P. Dougl. 506. 1. Black. Rep. 667. 1. Term Rep. 396. 2. Term Rep. 259. Eſp. Dig. 667.

But that which was now inſiſted on was, that the old churchwardens had a right to keep the pariſh-books (*a*).

So the rule was diſcharged, for a conteſt between pariſh-officers, which of them had a right to keep thoſe books, ought to be tried at law upon a feigned iſſue.

(*a*) But ſee now 17. *Geo.* 3. c. 38. ſ. 3.

Case 64. The King *againſt* Hutchinſon, Mayor, and The Aldermen of Carliſle.

If a burgeſs of a corporation offer to bribe a freeman to vote for a particular candidate for the office of mayor, the corporation, after ſummoning him to appear and anſwer this charge may, on his refuſing to anſwer, diſfranchiſe him, although he has not been convicted of this offence at common law.
S. C. ante, 19.
S. C. Fort. 200.
S. C. 1. Stra. 385, 386.
2. Barnard. K. B 301.
Fitzgib. 199.
2. Kel. 268. pl. 205.
1. Stra. 557.
2. Ld. Ray. 1283.
1. Burr. 339.
2 Burr. 723.
4. Burr. 1. 99.
Eſp. Dig. 677. 679.

MANDAMUS to "The mayor, aldermen and common council of *Carliſle*," to reſtore one *Simpſon* to the office of a capital burgeſs of the city of *Carliſle*, of which he had been deprived by them.

The return was, that the corporation had been time whereof, &c. a corporation by preſcription, with power of amotion, and was incorporated by a charter in the time of *Charles the Second*, by the name of "The mayor, aldermen, and twenty-four capital burgeſſes," who were to continue for life, unleſs they were removed by the mayor and aldermen, or the major part of them; that *J. Simpſon* was duly elected a capital burgeſs, and took the oath accordingly, which was to regard the good of the corporation, and not to diſcloſe the talk or word of any aſſembly; that he the ſaid *Simpſon* and one *Hutchinſon*, intending to violate his oath (*a*), offered, contrary thereto, one *Harriſon*, a freeman thereof, fifty guineas as a bribe for his vote and intereſt at the election of A MAYOR there, and promiſed that they would get a place for his ſon in THE CUSTOM-HOUSE; that by virtue of the ſaid charter the mayor, &c. has power to remove, &c. for any lawful cauſe, provided the greater part of the common council agreed to ſuch removal; that at an aſſembly of the mayor and nine aldermen, he the ſaid *Harriſon* had exhibited an information in writing of this matter *ad effectum ſequen. &c.* in open court; that *Harriſon* made oath thereof; and thereupon *Simpſon* was ſummoned to appear before them; who, after his appearance (*b*), refuſed to anſwer certain articles in writing exhibited againſt him on this information, of which *J. Simpſon* had a copy; whereupon this court of mayor, &c. adjourned from time to time three whole days, one after another, expecting that he would comply before they diſfranchiſed him; but he not complying, was by another aſſembly adjudged guilty, and removed *pro male geſt. et offenſ. in informatione et articulis ſuperius mentionat. &c. quæ cauſa, &c.*

REEVE for *Simpſon*, excepted to the return, and prayed *a peremptory mandamus*.

There are two queſtions:

FIRST, No ſufficient charge of an offence is laid, for which he is removed. The information is *inter alia* "*ad effectum ſequentem*," and the articles are "*ad effectum eundem in informatione mentionat.*" ſo that the articles being relative to the information will be uncertain, if the information is ſo. The information ought to have charged the offence poſitively *in hæc verba*,

(*a*) The perſon for whom the bribe was offered was not choſen MAYOR, but another perſon.—NOTE *to the former edition.*

(*b*) *Quære*, Whether he appeared.

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or at leaſt the ſubſtance of them; for as much certainty is requiſite in the return of an amotion as in an indictment. An indictment for a libel "*ad effectum ſequent.*" was held inſufficient; but had it been *ſecundum tenorem*, it had been good; for that implies an identity (*a*). It was reſolved by HOLT, *Chief Juſtice*, that ſuch an indictment for a libel need not ſhew the very words of the libel, but *ſcripſit quod*, and ſhewing the ſubſtance thereof, will be good (*b*). In any conviction before juſtices of the peace, as for deer-ſtealing, if the information is ſet forth *ad effectum ſequent.* the conviction will be void (*c*).

Forteſc. Rep. 204. Carth. 408. Ld Raym. 415. 2. Salk. 416.

SECOND QUESTION. The offence, being "*Bribery*," is an offence at common law, by which law the offender may be puniſhed, but it is againſt MAGNA CHARTA to deprive a man of his freedom before he is convicted of a crime by the ordinary methods which that * law preſcribes; for what ſecurity can any man have from the inſults of power, if he may be removed from his freedom before conviction, or before a trial by the laws of his country, to which every man has an equal right; now if *Simpſon* had been charged with *perjury* or *forgery*, which are crimes of a worſe nature than *bribery*, yet he could not be removed before conviction. *Baggs' Caſe (d)* makes the diſtinction, that no member of a corporation can be diſfranchiſed by a corporation, unleſs they have power by charter or preſcription; if they have no ſuch power, he ought to be convicted by the courſe of the common law, before he can be removed; a removal, where they have power by charter or preſcription is, within MAGNA CHARTA (*e*), a judgment *per legem terræ*; and, if he be firſt convicted, that is *per judicium parium ſuorum*; but that diſtinction has of late years been denied for law. *Lane (f)* was removed from the office of an alderman for a libel by virtue of an expreſs power given by the charter to remove, but he was reſtored, there being no precedent conviction. In the caſe of *The King v. The Mayor of Wilton* (*g*), on a *mandamus* to reſtore *Chalk* to the office of a burgeſs of *Wilton*, the corporation returned, that they were a corporation by preſcription with power of amotion, and that they removed *Chalk* for having altered a name in one of the corporation-books; and it was adjudged by HOLT, *Chief Juſtice*, that he ought to be reſtored: Firſt, becauſe the offence being forgery, he was indictable by the common law, and conſequently not removeable without a precedent conviction; and ſecondly, here did not appear any prejudice to the corporation, becauſe the alteration might be for their advantage; and ſo he acted neither againſt his duty nor his oath. In the caſe of *The Queen v. Perrott (h)*, the Court was of opinion that the return was inſufficient, not ſhewing any conviction, though no *peremp-*

2. Salk. 661. 11. Mod. 79. 85. 96. 12. Mod. 218. 2. Salk. 661.

* [100]

Fitzgib. 190. Forteſc. Rep. 200.

(*a*) 1. Salk 417. 661.
(*b*) See Cowp. 683.
(*c*) Salk. 383.
(*d*) 11. Co. 99.
(*e*) Mag. Car. c. 29.
(*f*) Fort. 200. 275. 11. Mod. 270. 2. Ld. Ray. 1304.
(*g*) Hilary Term, 8. *Will.* 3.
(*h*) Mich. Term, 8. *Anne.*

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tory mandamus was ever awarded; and in that caſe HOLT, *Chief Juſtice*, ſaid, that many things in *Baggs' Caſe* were not law, and particularly that point where it is ſaid, that if a layman be patron of an hoſpital, he may viſit it, and depoſe or deprive the maſter upon good cauſe, but that if he be deprived without cauſe, he ſhall have *an aſſiſe*; which is not law, for no *aſſiſe* lies, where a viſitor is appointed. And this inconvenience would follow, if ſuch a removal ſhould be allowed, *viz.* If the court of king's bench ſhould be of opinion that the removal is good, and the perſon ſhould be afterwards tried for bribery (which no man will deny but he may), and upon ſuch trial he ſhould be acquitted, then there would be a contrariety of opinions and claſhing of judgments, which ſhould be now foreſeen ſo as to be avoided. It is true, theſe perſons are incorporated by charter, but the king could not give them a greater power than he had to give, for he himſelf cannot deprive a man of his freehold before conviction, therefore the charter giving them a power to remove, &c. muſt be intended for a cauſe not cognizable at common law, *viz.* by doing any thing in the corporation contrary to his office, or by not doing his office, as a juſtice of peace not attending the ſeſſions, or an officer of the corporation being a *common drunkard*, or guilty of any miſdemeanor againſt the duty of his office, and which is no crime at common law; and there is a very plain difference between doing an unlawful act, and not doing the duty of his office, for the one is a crime, the other is only a contempt. But admitting that *Simpſon* denied to anſwer the interrogatories, yet that cannot be a ſufficient cauſe to disfranchiſe him; the rather becauſe it is not a matter regularly before the Court; for they ought to have returned the information made by *Harriſon*, and the articles ſpecially, and not *ad talem effectum*, as was done in this return. Admitting likewiſe, that what is returned is a public offence, yet if the corporation has received no damage by it, they cannot remove the offender before conviction; now it does not appear by this return, that the body corporate is in the leaſt damnified (*a*); it is true, the return is, that *Simpſon* intended to violate his oath; beſides, a breach of ſome parts of his oath would be no cauſe, for the oath is too general, "not to diſ-"cloſe any talk," whereas diſcloſing talk upon impertinent affairs could be no offence; but a bare intention ſhall not be prejudicial to him, unleſs he had done ſome act in purſuance of ſuch intention; and no man can tell whether bribery at an election to promote * a particular man to be mayor, would be prejudicial to the corporation, or not. It was objected that this offence was not indictable; but certainly it is, for admitting it to be an offence, and prejudicial to the corporation, yet the perſon bribing ought not to be disfranchiſed, but rather to be indicted upon the ſtatute of *Weſtminſter the Second*, c. 5. (*b*) by which it is enacted, "That "none ſhall diſturb any by force, malice or menaces, to make

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(*a*) *Pattiſon*, for whom the money was offered, was not choſe, but *Tate*.

(*b*) 2. Inſt. 169.

"free

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"free election, in pain of great forfeiture;" and it is alſo againſt the common law.

E contra. In anſwer to the chief objection, that *Simpſon* ought not to be removed from his freehold before conviction, becauſe the crime for which he was charged is an offence at common law; this was admitted to be true, but it is a crime relative to the duty of his office in the corporation, and therefore he may be removed before conviction; it is an offence which will deſtroy the very being of this corporation; it is contrary to his oath of fidelity when he was firſt admitted to his freedom. There are ſome caſes where men have been removed for offences puniſhable at law, even before any conviction; as for inſtance, a man was removed for a riot in the council-chamber (*a*), which is an offence puniſhable at common law, yet the offender was removed before conviction; and ſo was *Serjeant* WHITACRE, who having notice, refuſed to attend at the ſeſſions of the peace (*b*), for which cauſe he was turned out of the recorderſhip of the borough of *Ipſwich* before conviction. The like is often done in the colleges of both our univerſities (*c*); and *Baggs' Caſe*, which is THE MAGNA CHARTA of all caſes of this nature, warrants this opinion, and eſpecially ſince the ſtatute of 9. *Anne*, which gives a traverſe to the return of *a mandamus*, and which *Simpſon* having refuſed, he has thereby implicitly admitted the crime for which he is charged; becauſe, if it was falſe, he might have traverſed the return, and therefore he ought not to be favoured. And as to his removal before conviction, this is a condition annexed to his freedom in this corporation, which he took, ſubject to be removed for any reaſonable cauſe; and his removal is the more juſt, becauſe he had all reaſonable opportunities allowed him to defend himſelf if he could.

Forteſc. Rep. 206. Ante, 3. Poſt. 154. 377.

Upon the whole matter, a return of *a mandamus* needs not ſo much certainty as an information or indictment; becauſe, if it be true, no puniſhment ought to be inflicted on that account (*d*).

REPLY. * The objection, That they ſhould have ſet forth in the return the information of *Harriſon in hæc verba*, and not *ad talem effectum*, is not anſwered; now the reaſon why that information ſhould be ſet forth to a certainty is, becauſe it is the very ground of the charge by which *Simpſon* was removed; and it is not ſufficient to ſay, that ſo much certainty is not required in this caſe as in an indictment, and to alledge for a reaſon, that no puniſhment is to be inflicted upon that account, becauſe it is a great puniſhment for a man to loſe his freehold. Beſides, they have not ſet forth in this return, that *Simpſon* had done any thing prejudicial

* [102]

(*a*) Rex v. Yates, Stiles, 477.
(*b*) 2. Salk. 434.
(*c*) 1. Sid. 14. 2. Sid. 97. 4. Mod. 37. 2. Ld. Ray. 1343.
(*d*) FORTESCUE, *Juſtice*, is of opinion, that a return to a *mandamus* requires the uſual certainty, even much greater than an indictment, for that may be traverſed, but here the king cannot traverſe. Fort. 204.—NOTE *to the former edition*. But for the certainty required upon this ſubject ſee Rex v. Lyme Regis, Dougl. 149 to 160.

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to this corporation; and as to *Serjeant Whitacre's Caſe*, it is no manner of authority in the preſent caſe; it is true, he was removed before conviction, but it was for not attending the ſeſſions to direct the corporation in proceedings to adminiſter juſtice, which was an offence done to the corporation, and conſequently a forfeiture of his office of recorder.

PRATT, *Chief Juſtice.* By the return of this *mandamus* it appears, that *Simpſon* was duly ſummoned, and that they who removed him had an authority ſo to do; but it muſt be for a lawful cauſe, which does not appear by this return; for the information and the articles grounded thereon, are not ſufficiently ſet forth to inform the Court of the crime, being only returned *ad effectum ſequen.*; now where words in an indictment for a libel were ſet forth *ad effectum ſequen.* that was held inſufficient in the caſe of *The King v. Bear* (*a*); and there is no reaſon why an indictment ſhould be more certain than the return of a *mandamus*; for in one caſe the party is to be puniſhed, and ſo he is in the other, *viz.* by the loſs of his freedom,

12. Mod. 218. See 11. Mod. 79, 85. 96.

As to the queſtion, Whether a man can be removed from his freedom for a crime puniſhable at law before he is convicted of ſuch crime; PRATT, *Chief Juſtice*, held he could not (*b*); and that in the caſe of *The King v. The Mayor of Glouceſter* (*c*), it was ſo adjudged in point, that bribery was an offence puniſhable at common law; and that a juſter trial might be had in the courts of *Weſtminſter* than by a mayor and common-council-men in a corporation, who are generally corrupted, and uſe arbitrary methods in trials there. So he was of opinion that a *peremptory mandamus* ought to go.

*[103] * But THE OTHER THREE JUDGES were of a contrary opinion: their reaſons were as follow:

It is agreed on all hands, that there was a crime done, and it ſufficiently appears that the corporation ſuffered by it; for what can be a greater injury than corrupt members? and it ſeems very reaſonable, that where the immediate good of a corporation is concerned, that they ſhould have power to remove him who acts contrary to ſuch good. This corporation has ſuch a power by the very words of their charter, *viz.* "to remove for a lawful "cauſe," for otherwiſe thoſe words are inſignificant; and it would be very hard if a corrupt member could not be removed before conviction, becauſe in the mean time he will have a vote in all corporate acts, which may be prejudicial to the corporation where ſuch a voter is guilty of ſo great a crime as bribery.

(*a*) 2. Salk. 417. Carth. 408. Ld. Ray. 415.

(*b*) But ſee the caſe of Rex *v.* Tiverton, poſt. 186. when PRATT, *Chief Juſtice*, held, that *bribery* is a ſufficient cauſe to remove a man from his office before conviction.

(*c*)

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THE COURT, as to the form of this return, were equally divided.

PRATT, *Chief Juſtice*, and POWYS, *Juſtice*, held it inſufficient.

EYRE and FORTESCUE, *Juſtices*, held it well enough.

And therefore there could be no judgment againſt the return (*a*).

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(*a*) It is ſaid, S. C. Fort. 200. that as to the form of the return the whole Court, after ſome little doubt, held it well, becauſe on the whole return there appeared to be a good cauſe of removal.

Ludlam, Chamberlain of London, *againſt* Lopez. Caſe 65.

THIS was an action of debt for twenty-five pounds, brought by THE CHAMBERLAIN of *London* againſt the defendant, upon the ſtatute 6. *Anne*, c. 16. by which the ſtatute 1. *Jac.* 1. c. 19. for well *garbling ſpices* was repealed, and the duty ariſing by that act, which was part of the revenue of THE CITY OF LONDON, taken away, and an equivalent granted to the ſaid city, by taking money to admit *brokers* to exerciſe their office.—The words are, that "every perſon who ſhall act as *a broker*, or employ any man under him to act as ſuch in the city of *London*, ſhall be admitted by the court of mayor and aldermen there, and ſhall upon his admiſſion pay to THE CHAMBERLAIN of the ſaid city forty ſhillings, and every year, on the twenty-ninth day of *September*, forty ſhillings more, which money ſhall be enjoyed by the ſaid city; and every perſon acting as a broker, and not being admitted as aforeſaid, ſhall forfeit to the ſaid city twenty-five pounds, to be recovered in the name of THE CHAMBERLAIN."

If a ſtatute as the 6. *Anne*, c. 16. aboliſh the office of *Garblers of Spices* in the city of *London*, and in lieu thereof enact, "that "every perſon "acting as a "broker ſhall "pay *forty ſhil-* "*lings* yearly to "the city, on pe- "nalty of *twenty* "*five pounds*;" the king cannot by his pardon diſcharge a perſon from the payment of this penalty; for the intereſt in it is veſted in the city from the time the offence is committed.

The defendant by his plea confeſſed, that he had acted as *a broker* in THE CITY, and that he was not admitted thereunto; but farther ſets forth the act of general pardon, 7. *Geo.* 1. c. 29. by which the king diſcharged all manner of offences which he * might or could in any wiſe pardon; and averred, that this was an offence which the king might pardon, &c.

The plaintiff demurred to this plea, and the defendant joined in demurrer.

* [104]

S.C. 1. Stra. 529. Dy. 238. 323. Cro. El. 632. 68a. Cro. Car. 199. 5. Rep. 49, 50. a. b. 1. Salk. 458. 1. Stra. 529. 2. Stra. 1272. 4. Burr. 2460. 5. Com. Dig. "Pardon" (I.).

THEY WHO ARGUED *for the defendant* inſiſted, that this being an offence of a public nature might be pardoned, though the action for the duty muſt be brought by the ſubject. It is true, the admittance-money is given to the city as a recompence for taking away the revenue of garbling ſpices; but yet the offence of not being admitted as *a broker*, is pardoned; for all amerciaments are pardoned, though the ſubject has a right to them, and ſo are all popular actions before they are actually commenced, even though the action is given to a particular perſon, who is the party aggrieved; therefore this offence is pardoned with all its conſequents.

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The trade of a broker was lawful before 6. *Ann.* c. 16. ſo that the exerciſe thereof without a licence is only an offence againſt that act. The demand by THE CHAMBERLAIN in this action is founded on a misfeaſance for acting without a licence. There is a duty by the act payable by every broker, and veſted in the city, for which if any action was brought, there could be no pretence that the ſame was pardoned, that being a private property. This offence is made by another diſtinct clauſe of the act. The duty payable by the act is twenty pounds for the admittance of every broker; but the tort and contempt in the defendant's acting without any licence is the original cauſe of this action.

IT WAS ARGUED *for the plaintiff*, that the act which intitles the city to the forfeiture, gives it in lieu of another part of their revenue taken from them, and the money which is to be paid by the brokers is in nature of a rent to be received by THE CITY for a duty which was veſted in them before, and in recompence of a civil right of which they were now deprived, which recompence being confirmed by the ſtatute, and a penalty given for not complying with that law, ſuch penalty cannot be pardoned, eſpecially ſince an action is given by the ſtatute for the recovery thereof. If the duty payable on every admittance be not pardonable, then the forfeiture for acting without admittance cannot be pardoned, becauſe that is an injury to the city in depriving them of the duty which otherwiſe would be payable. This may be compared to a leaſe with a *nomine pœnæ*, or to a bond with condition of forfeiture. The city might have releaſed the forfeiture before any action commenced, which proves an intereſt veſted. As to *Biggin's Caſe* (*a*) an amerciament is no ſatisfaction to the party, and ſo may be diſcharged. The ſame reaſon holds as to burning in the hand. The reaſon given by my *Lord Coke* (*b*), why the king cannot pardon a popular action after it is commenced, as to the informer's part, is, becauſe an intereſt is then veſted; but before the action is brought, no intereſt is veſted in any particular perſon; and therefore the king can pardon it; which reaſon will hold in this caſe, becauſe there is a right veſted in the city before this action was brought, and before the general act of pardon was made, *viz.* a right to the duty ariſing by the garbling of ſpices, and a right to that recompence which was given in lieu thereof, ſo that this action is well brought, and not pardoned. If an action of aſſault and battery be brought, the king cannot pardon the damages recovered in ſuch action (*c*). So where a libel is exhibited in the ſpiritual court, and the plaintiff obtains a ſentence, and coſts are taxed, the king by a general pardon cannot diſcharge thoſe coſts (*d*); and it is * for the ſame reaſon that the king cannot pardon an appeal, becauſe the ſubject has an intereſt in that ſuit (*e*).

* [105]

THE COURT. This is a duty given to THE CITY OF LONDON for and inſtead of another duty taken from them by act of

(*a*) 5. Co. 50. Cro. Eliz. 632. Moor, 571.
(*b*) 3. Inſt. 195. 394.
(*c*) 5. Co. 51.
(*d*) Cro. Car. 199. Cro. Jac. 159.
(*e*) 5. Com. Dig. "Pardon" (F.).

parliament,

LUDLAM, CHAMBERLAIN OF LONDON, *againſt* LOPEZ.

parliament, and this forfeiture is given as a proviſional ſecurity for what they might ſuffer thereby, and therefore it is not pardonable; and as a right veſts in an informer immediately upon bringing his action, ſo in this caſe, in that very inſtant of time in which the offence was done, a right veſted in THE CHAMBERLAIN, which intitles him to an action for the forfeiture, and which the king cannot pardon. He cannot pardon an offence againſt the ſtatute *de malefactoribus in parcis*, as far as any man has an intereſt therein (*a*). It is true, it was held in *Biggin's Caſe* (*b*), that the queen might pardon the burning in the hand; but this ſeems to be the opinion of my *Lord Coke* alone (*c*); and it is plain that the reaſon he gives does not warrant that judgment; for he tells us, it is becauſe burning in the hand is no part of the judgment; which is certainly a miſtake, for in an appeal, as that caſe was, it is part of the judgment; beſides, that caſe is reported in ſeveral other books, but the ſame reaſon in none of them for that judgment (*d*); therefore it is probable that the true reaſon might be, becauſe burning in the hand is a puniſhment to be inflicted on a criminal for the public good, in which no particular ſubject has any right. And laſtly, a pardon is properly a releaſe given by the king; but it is a general rule, that a right which is veſted cannot be releaſed.

So judgment was given againſt the defendant, *viz.* that this offence was not pardoned.

(*a*) 2. Inſt. 200. 3. Inſt. 238.
(*b*) 5. Co. 50. Moor, 571. pl. 782. Cro Eliz. 632.
(*c*) 3. Inſt. 238.
(*d*) Moor, 571. Cro. Eliz. 632. See alſo 2. Hawk. P. C. ch. 37. ſ. 39.

*[106]

Blackwell *againſt* Naſh.

Caſe 66.

Michaelmas Term, 8. *Geo. Roll* 212.

If *A.* covenant to transfer ſtock on or before ſuch a day, and *B.* covenant to pay a certain ſum of money to *A.* for the ſtock on or before the ſaid day, the transfer of the ſtock is not a *condition precedent*; and therefore a declaration in covenant by *A.* for non-payment of the money, ſtating that he was ready to transfer on the day, but that the defendant refuſed to accept it, is good.—S. C. 1. Stra. 535. Ante, 40. 68. Poſt 294. 219. 1. Roll. Abr. 466. 1. Saund. 320. Lutw. 496. Ld. Ray. 687. 5. Com. Dig. "Pleader" (C. 53.). (C. 54.). (C. 56). Dougl. 684. (659). Comy. Rep. 116. Stra. 615. 712.

THE PLAINTIFF covenanted by indenture to transfer, &c. *South Sea* ſtock to the defendant, on or before the twenty-firſt day of *September*, and the defendant covenanted to pay the plaintiff eight thouſand five hundred pounds, on or before the ſaid day; and entered into a bond in the penalty of ſixteen thouſand pounds, conditioned for the performance of the ſaid covenant.

In an action of debt brought on the ſaid indenture, the breach aſſigned was for non-payment of the eight thouſand five hundred pounds, and the plaintiff in his declaration ſet forth all this matter, and that *pro et in conſideratione præmiſſorum*, the defendant covenanted to pay the money; then he ſet forth, that he (the plaintiff) was ready at the time and place agreed on to transfer the ſtock, * and that then and there *obtulit ſe* to transfer it; and averred, that the defendant *adtunc et ibidem recuſavit acceptare*.—The defendant demurred to the declaration.

The

BLACKWELL *againſt* NASH.

The queſtion was, Whether theſe were *mutual covenants*, or only a *condition precedent?* for if they were mutual covenants, then the action is well brought, but otherwiſe if it be a *condition precedent*, becauſe then the performance of that condition muſt be ſet forth.

This caſe was ſpoken to in *Michaelmas Term*, in the eighth year of *George the Firſt*.

It was objected, that the tender was not ſufficient, for it ought to be made the laſt inſtant of the day, for until then the defendant was not obliged to accept the ſtock; wherefore the plaintiff ought to have ſpecified the hour when the tender was made, that ſo it may appear to be the laſt inſtant when a transfer could be made (*a*).

WEARG, *contra*. This being a perſonal tender, need not be made the laſt inſtant of the day; but if made any part of the day is good, and differs from a tender made in the abſence of the party, which muſt be the laſt inſtant of the day, becauſe the party has until then to accept it.

And THE COURT ſeemed of the ſame opinion.

Sed adjournatur.

This Term the plaintiff had judgment without argument.

And upon a writ of error (*b*) afterwards brought in THE EXCHEQUER CHAMBER, that judgment was affirmed.

(*a*) See Mordant *v.* Small, poſt. 219. Bullock *v* Noke, 1. Stra. 579. Duke of Rutland *v.* Hodgſon, Stra. 777. Thornton *v.* Moulton, Stra. 533. Bowlen *v.* Bridges, 2. Stra. 832. Clark *v.* Tyſon, 1. Stra. 504. Lancaſhire *v.* Killingworth Comy. Rep. 116. 1. Ld. Ray. 686. 12. Mod. 529. Sayer's Rep. 189. Goodiſon *v.* Nunn, 4. Term Rep. 761.

(*b*) See S. C. in 1. Stra. 535. the third edition.

* ['107]

Caſe 67.

Warren *againſt* Conſett.

If *A.* covenant to transferſtock, and *B.* covenant, under a penalty, to accept the ſame, a declaration in debt by *A.* for the penalty ought to ſhew that he *actually transferred* the ſtock, and that *B.* refuſed to accept it; for it is not enough to ſay, that he was *ready to tranſfer, &c.*

S. C. Pract. Reg. 306. S. C. 1. Bar. K. B. 15.

AN ACTION OF DEBT was brought by the plaintiff in the court of common pleas. He declared upon an indenture by which he covenanted to transfer twenty-five ſhares in the *Welch Copper Company*, and the defendant covenanted that he would receive and pay for the transfer, &c. and bound himſelf in the penalty of two thouſand eight hundred pounds to perform the ſame, and for non-performance thereof this action * was brought.

The defendant pleaded *nil debet*, to which plea the plaintiff demurred, and had judgment in that court for the inſufficiency of the plea, for that *nil debet* is an ill plea to this action.

A WRIT OF ERROR was thereupon brought in the court of king's bench.

It was argued, that this judgment was erroneous.

FIRST, An objection was made to the form of the declaration, *viz.* that the plaintiff had not ſet forth, that he had done all things neceſſary

neceſſary for him to do, to intitle himſelf to this action, for he ſhould have alledged, that he tendered to transfer the ſhares on a certain day, hour, and place, and that the defendant refuſed to accept them; and he only ſhews that he was ready to transfer them *debito modo*, but does not ſay at what time or place; now where it is ſet forth as it ought to be, at a certain time and place, and no perſon is there to receive it, the party muſt ſhew at what time of the day he was at the place, and how long he ſtayed there; though a refuſal is ſhewn, yet it is not ſhewn to be at that time (*a*).

SECONDLY, Becauſe *nil debet* was adjudged no good plea, which is erroneous, it being certainly a very good plea; for wherever matter of fact is mingled with ſpecialty, or with a record, *nil debet* is a good plea, as in debt before auditors, it is a good plea.

"*Nil debet*" is no a good plea to an action of debt, for a penalty on a covenant. S. C. poſt. 332. 382.

BUT ON THE OTHER SIDE it was argued to maintain this judgment, that *nil debet* is no good plea in this caſe; and the chief reaſon was, becauſe of the ſolemnity of a deed; now here the debt ariſing merely upon the deed, and not on any collateral matter *dehors*, in ſuch caſe the defendant ſhould have denied the deed, and have pleaded ſome other deed to avoid it; for if he once own the deed, it is then a good debt, and therefore *nil debet* is no good plea to it. Beſides, it is a plea which includes ſeveral iſſues, and for that reaſon it is ill. It is no good plea to an action of annuity, nor to an action of debt on a bond brought by an adminiſtrator; it is true, it is a good plea to an action of debt brought for rent reſerved upon a leaſe for years; but the reaſon is, becauſe the demiſe is the foundation of the action, and the deed is only an evidence of the demiſe, and ſo it is a good plea to an action of debt brought on penal ſtatutes, and to actions of debt brought upon awards, or to accounts before auditors; and the reaſon is, becauſe theſe are not the deeds of the parties, but here the deed of the party himſelf is the very *lien*, and not any thing *in pais*; and the *giſt* of the action is for payment of money. * It is no good plea to an action on a policy of inſurance, nor to an action on a bail-bond, though there is ſomething *dehors* to be done, to charge the inſurers and the bail.

S.C. 2. Ld. Ray 1500. S.C. 2. Stra. 778. 21. *Hen.* 7. pl. 14. Keilw. 153. 5. Co. 43. 6. Co. 44. 3. Lev. 170. Hard. 332. Salk. 565. 5. Burr. 2586. 2. Black. Rep. 683. Cowp. 588. 5. Com. Dig. "Pleader" (2. W. 16.).

* [108]

THE COURT was divided in opinion, but ſeemed inclinable to reverſe the judgment (*b*).

(*a*) See Mordant *v.* Small, poſt. 219. and the caſes there cited.

(*b*) This caſe was firſt argued in Hilary Term, 8. *Geo.* 1.; 2. Stra. 778. It was argued a third time in Mich. Term, 11. *Geo.* 1. poſt. 325. and in Eaſter Term, 12. *Geo.* 1. the judgment of the common pleas was unanimouſly affirmed, for that the action being founded on the articles, and the particular facts being only auxiliary to the deed, the plea of *nil debet* was no good plea, S. C. poſt. 382. S. C 2. Stra. 778. for if in ſuch caſe this plea was allowed, it would refer the validity of the deed to the conſideration of the jury, S. C. 2. Ld. Ray. 1503. So in debt on bond, the plea of *nil debet* is bad on a general demurrer. Anonymous, 2. Wilſ. 10. S. P. Bull. N. P. 169. S. P. Hart *v.* Weſton, 5. Burr. 2586. S. C. 2. Bl. Rep. 683. S. P. Mills *v.* Bond, Fort. 363. Mayhew *v.* Mayhew, Fort. 367. But it is ſaid that *nil debet* to an action of debt on bond, is good after verdict, 2. Wilſ. 10. and is a good plea to debt on a contract, 5. Com. Dig. "Pleader" (2. W. 16.). or where *the ſpecialty* is only inducement to the action, and the matter of fact is the foundation of it, 2. Ld. Ray. 1503. Wilſon's Caſe, Hardres, 332.

Caſe 68.

Pennoire *againſt* Brace.

S.C. 1. Ld. Ray. 744.
S. C. 5. Mod. 338.
S. C. 1. Salk. 319.
S.C.Comb.441.
S.C.Carth.404.
S. C. 12. Mod. 130.

IT WAS RULED in this caſe, that where a writ of error is brought by two, and one of them dies pending the writ, the plaintiff in the original action by entering a ſuggeſtion on THE ROLL, that one of the plaintiffs in error is dead, may take out execution on the judgment, without ſuing out a *ſcire facias*, either againſt the heir or executor of the dead perſon.

S. C. 1. Show. 402.

Caſe 69.

Flemming *againſt* Parker.

On a declaration of four counts, if there be a demurrer to one, and iſſues on the others, a *writ of enquiry* on the demurrer, reciting a judgment *de præmiſſis*, is good, after a *remittit damna* on the iſſues.

THE PLAINTIFF declared on four counts, and the defendant demurred to one, and pleaded to iſſue as to the other three, and the plaintiff joined in demurrer, and had judgment, and a writ of inquiry iſſued, reciting a judgment *de præmiſſis*, and that *recuperare debet damna occaſione præmiſſorum.*

IT WAS MOVED *in arreſt of judgment*, that a writ of inquiry would not lie on this judgment until a *nolle proſequi* was entered as to the other three iſſues, or a *venire* to try them; for then, and not before, a writ of inquiry might be had to inquire of the damages upon the judgment in demurrer.

But in this caſe the plaintiff having *remitted the damages* as to the other three iſſues, before the judgment was entered on the demurrer, IT WAS HELD good: and THE MASTER of the office affirmed, that that was the proper method of proceeding.

* [109]

Caſe 70.

* Coatſworth and his Wife, Adminiſtrator of W. S. *againſt* Shaftoe.

Friday, 23 *November* 1722.

If an adminiſtrator bring trover on a converſion in his own time, he ſhall pay coſts on a verdict for the defendant.

Stra. 634.
2. Stra. 785.
Barnes, 186.
Andr. 357. 359.
Reg. C. P. 115.
Ventr. 92.

TROVER. The plaintiffs declare that their teſtator *W. S.* on the eighth day of *December* 1718, was poſſeſſed of ten horſes, *et ſic inde poſſeſſionatus exiſtens eodem die et anno, obiit inteſtat. poſt cujus mortem ſſ.* on the twenty-third day of *April* 1720, adminiſtration was committed to the plaintiffs; that afterwards, on the eighth day of *April*, the ſaid horſes were loſt; *et eodem die et anno devenerunt per inventionem* to the defendant, who converted them, &c.

Upon *not guilty* pleaded, there was a verdict for the defendant.

FAZAKERLY moved, that the defendant might recover his *full coſts*. The difference is, wherever an executor brings an action, and upon his declaration ſhews matter ſufficient to enable him to ſue in his own name, without ſtyling himſelf executor, if a verdict paſs againſt him, he ſhall pay; but otherwiſe where he is obliged to ſue as executor. The plaintiff here might have declared on his own poſſeſſion, and the evidence would have been ſufficient:

the

the goods being loſt after the adminiſtration committed, there was a poſſeſſion in the adminiſtrator, which would have enabled him to have brought the action in his own name; ſo that the converſion is an injury to the adminiſtrator.

COATSWORTH AND HIS WIFE ADMINISTRATOR OF W. S. *againſt* SHAFTOE.

ON THE OTHER SIDE *it was argued*, that an executor ſhall never pay coſts, unleſs he declares upon an actual poſſeſſion (*a*).

THE COURT. This point ought not to be now queſtioned; all the caſes were conſidered, and the point ſettled, in the caſe of *Baller v. Delander* (*b*).

(*a*) 2. Lev. 165. 3. Lev. 60. 375. 6. Mod. 9. 2. Stra. 1107. Andr. 358.
(*b*) 2. Stra. 785. Annaley, 205. See alſo Jenkins and his Wife *v.* Plumbe, 6. Mod. 91. 181. Portman *v.* Carne, 2. Ld. Ray. 1413. Downer *v.* Shaft, Barnes, 129. Cockeril and his Wife *v.* Knyſton, 4. Term Rep. 277. Goldthwaite and his Wife *v.* Petrie, 5. Term Rep. 234. in point.

Cooper *againſt* Beale. Caſe 71.

AN EJECTMENT was brought to recover the poſſeſſion of a *Quakers Meeting-houſe*; none of them would receive the declaration, and the meeting-houſe was never open but on *Sundays*, on which day the delivery of a declaration is not good.

In ejectment, judgment cannot be entered upon confeſſion of the *caſual ejector*.
Run. Eject. 6. 58.
Salk. 255.

Thereupon the plaintiff took a judgment by confeſſion of the nominal defendant.

And now upon a motion that judgment was ſet aſide, becauſe in fact it is the confeſſion of the plaintiff himſelf.

Holoway *againſt* Thurſton. Caſe 72.

IN AN ACTION ON THE CASE, &c. the plaintiff declared, and laid his damages to four hundred pounds.

If the ſtatute of Limitations be pleaded to an action for 400l. a replication that a *latitat* for 150l. was ſued out, without averring it for the *ſame cauſe*, is bad.

The defendant pleaded the ſtatute of Limitations, "*non aſſumpſit infra ſex annos.*"

The plaintiff replied, that he ſued out a *latitat* to take the defendant two years before the action brought, for one hundred and fifty pounds.

And upon a demurrer to this replication,

IT WAS INSISTED *for the defendant*, that theſe were different actions, for no man would take out *a latitat* for one hundred and fifty pounds, and declare *ad damnum* four hundred pounds; it is true, if the plaintiff had averred it had been one and the ſame cauſe of action, it might have been otherwiſe.

And ſo it was ruled by the Court.

Caſe 73.

Wright *againſt* Maſon.

If *a wife* commit *a treſpaſs*, and an attorney, for the purpoſes of extortion and oppreſſion, procure a warrant and apprehend *the huſband*, the court will grant *an attachment* againſt him.

UPON A MOTION for an attachment againſt the defendant and one *Purcell*, an attorney, for foul practice, and for oppreſſing the plaintiff, by threatening to take him up by a warrant of the Chief Juſtice, and by colour thereof getting ſome money from him, and a note under his hand to pay more for not ſending him to *Newgate* for a treſpaſs they pretended to be done by his wife;

A RULE was made for them to ſhew cauſe on ſuch a day, why *an attachment* * ſhould not go againſt them.

* [110]

Ante, 81.

And upon that day they appeared and produced ſeveral affidavits, which were read in court, and by which they denied the charge, but not poſitively and directly.

And it appearing by the affidavits that the fact was done by the wife, there was no colour to procure the warrant of the Chief Juſtice againſt the huſband; and it farther appearing that the attorney had indorſed this note to another, on purpoſe to load the plaintiff with an action, he was ordered to ſtand committed until he ſhould anſwer *interrogatories*, which were to be filed in *four days*.

And afterwards, in anſwer to the *interrogatories*, he ſwore off all that was charged againſt him, for which he was indicted, and convicted of perjury.

Caſe 74.

Cæſar *againſt* Holt and Others.

The Court will will not grant an *attachment* on *affidavit* of a *reſcous*.

S. P. 2. Barnard K. B. 58. Poſt. 342. Salk. 586. Stra. 531. 642. 6. Com. Dig. "Reſcous" (D. 6.).

A RULE was made for the defendants to ſhew cauſe why *an attachment* ſhould not go againſt them for committing *a reſcous*, *&c.*

And now they ſhewed for cauſe, that ſuch attachments ought not to be allowed upon *affidavits* of *a reſcous*, becauſe in ſuch caſe the parties might be taken into cuſtody before the writ is returned; therefore the ſheriff ought to return *a reſcous* before the defendants ſhould be proſecuted for it (*a*).

And THE COURT was of opinion, that the ſheriff ought to return the writ, which if falſe, then the plaintiff has an action againſt him; but if the return be true, then the action lies againſt the reſcuers (*b*); therefore if *an attachment* (*c*) ſhould be granted on *an affidavit* of a reſcous before the return of the writ, the defendant could have no action againſt the ſheriff for a falſe return.

(*a*) See Sheather *v.* Holt, Stra. 531. and Rex *v.* Elkins, 4. Burr. 2129.

(*b*) Cro. Jac. 485. 3. Bulſt. 200. Cro. Car. 109. 6. Com. Dig. "Pleader" (D. 2.).

(*c*) Cro. Jac. 419. 2. Vent. 175. Salk. 586. Rex *v.* Pember, B. R. H. 112.

HILARY

HILARY TERM,

The Ninth of George the Firſt,

IN

The King's Bench.

Sir John Pratt, *Knt. Chief Juſtice.*

Sir Lyttleton Powis, *Knt.*
Sir Robert Eyre, *Knt.*
Sir John Forteſcue Aland, *Knt.* } *Juſtices.*

Sir Robert Raymond, *Knt. Attorney General.*
Sir Philip Yorke, *Knt. Solicitor General.*

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* The King *againſt* The Mayor and Burgeſſes of Tregony. Caſe 75.

UPON A MOTION for a *peremptory mandamus*, the caſe was, that a former *mandamus* was directed to the mayor and burgeſſes of *Tregony* in *Cornwall*, commanding them, "*quod eligetis et juretis majorem, &c. ſecundum authoritatem* "*veſtram, &c.*"

A *mandamus* directed to "the "mayor and "burgeſſes," commanding them "to elect "and ſwear in "a mayor *ſecundum authoritatem veſtram*," is good, although the power be for the burgeſſes *to elect* and the mayor to ſwear in. S. C. poſt. 127. 1. Roll. Abr. 409. 2. Jones, 52. Salk. 699. 436. Carth. 501. Stra. 55. 640. 893. 2. Burr. 782. 3. Burr. 1452.

IT WAS MOVED for a *ſuperſedeas* to that *mandamus*, for that the writ was not good, becauſe it was directed to the mayor and burgeſſes to elect and ſwear a mayor, whereas the power of electing is only in the burgeſſes, and the power of ſwearing in the mayor alone; ſo that the mayor cannot make a return of this writ as directed to him to elect; nor the corporation as directed to them to ſwear a mayor, ſo that if the burgeſſes ſhould make a return as to the ſwearing part, they would be uſurpers, and if they do not make a return, they will be in contempt of this court. Beſides, it is incongruous for a *mandamus* to be directed to ſwear a mayor not yet elected; therefore it being directed to a perſon who had no power to act, it ought to be ſuperſeded, like the *Caſe of the City of London*, where ſuch *a mandamus* was directed to the mayor and aldermen, &c. when the power was in the mayor alone, and that was adjudged in this court to be not good.

THE KING *against* THE MAYOR AND BURGESSES OF TREGONY.

But THE COURT were all of opinion in this case, that they ought to make a return, for the writ commanding them, "*quod* "*eligetis et juretis secundum authoritatem vestram*, it * shall be taken *reddendo singula singulis*, and to be the return of both, &c. (*a*).

*[112]

THEN they returned, that *Tregony* is a borough incorporated by letters patent of king *James the First*, by which it is provided, that they proceed to an election of a mayor every year, on the *Thursday* next after *Michaelmas-day*, and that the mayor elected at that time shall continue mayor until another be duly elected; and farther they return, that the day of election being past, they cannot obey it, and proceed to a new election on any other day than that very day appointed by the charter by which they are incorporated, unless on the death or amotion of the mayor.

Previous to the 11. *Geo.* 1. c. 4. s. 1. if a particular day was appointed by the charter of a corporation for the election of a mayor or other corporate officer with a power of holding over, they could not elect on any other day in the year, except on the *death* or *removal* of the mayor for the time being.

Post. 127.

And now the following objections were made both to *the writ* and *the return*.

FIRST, as to the writ, that it was directed to the mayor and burgesses to elect and swear a mayor, where the power of swearing, &c. is in the mayor alone; and though the Court was of opinion, that this writ ought not to be *superseded* before it was returned, because if there is a fault, it might judicially appear before them, yet when the fault appears upon the very return itself, the writ ought to be quashed. Now there is a plain difference between a writ to elect, and another to swear a man into his office; for the writ to elect may be directed to the whole body corporate, of which the mayor is the head; but a writ to swear the person elected must be directed to the mayor alone, because no other person has authority to swear him, and no such authority can be given but by special words in the charter; and it would be very hard if this writ should be good, because the execution thereof would subject the parties to an information for usurping an authority where they had none.

SECONDLY, then as to *the return*, it is, that they could not obey the writ, because the day of election of a mayor was lapsed, and that they could not proceed to a new election, but upon the very day appointed by their charter, unless upon the death or amotion of the mayor in being.

IN ANSWER TO WHICH *it was argued*, that the day was only directory, and that there could be no inconveniency, if they should proceed to an election on any other day, because the writ of *mandamus* usually goes to fill up the body corporate, for the sake of succession, which is a case of necessity.

BUT THEY WHO ARGUED *for the return* said, there could be no such necessity in the present case, because the corporation was

(*a*) But see Rex *v.* Mayor of York, that after a return to a *mandamus* has been made, it is too late to take objections to the writ itself. 5. Term Rep. 74.

full;

full; therefore there was no neceſſity to elect on any * other day than on that appointed by the charter; beſides, if the return be not true, it ought to have been traverſed *(a)*.

THE COURT was of opinion, that *the writ* was good upon a reaſonable conſtruction of the words *reddendo ſingula ſingulis*; for it is directed to the body corporate, who has the inheritance as to the election of a mayor, and likewiſe to him who has the ſpecial power as to the ſwearing a mayor, it being that *eligetis et juretis ſecundum authoritatem veſtram.* Now all thoſe to whom *the writ* is directed, are to do ſomething, for they are all to be preſent at the ſwearing a new mayor when the oath is adminiſtered to him, which is uſually done by the town-clerk, and ſo far they may be ſaid to have a power to ſwear him, for the mayor is preſent, and ſo are the burgeſſes at that time.

THEN as to *the return*, it is likewiſe good, for though it has been ſaid that the day is only directory, yet it is clear by the charter, that they muſt chuſe a mayor on the very day therein appointed, which is on *Tueſday* next after *Michaelmas-day* every year, and that he muſt continue mayor until another be choſen, *ſecundum formam literarum patentium*; now it cannot be ſaid, that a mayor choſen on any other day was elected *ſecundum formam literarum patentium* *(b)*.

For which reaſons it was adjourned *(c)*.

(a) See 9. *Anne*, c. 20.
(b) See ſtatute 11. *Geo.* 1. c. 4.
(c) A peremptory mandamus was denied, S. C. poſt. 127.

Atwood *againſt* Beach. Caſe 76.

Bail taken on a *ſcire facias* miſnaming the principal, ſhall be diſcharged on motion after two *nihils* returned.

JUDGMENT was had againſt the principal, and a *ſcire facias* was brought againſt the bail of *John King*, when his name was *Thomas King*, and after two *nihils* returned, the bail were taken in execution; and this matter appearing now to the Court upon a motion,

THE COUNSEL *for the bail* prayed, that they might be diſcharged;

Which was accordingly done.

SED PER CURIAM, If the *ſcire facias* had been returned *ſcire feci*, they could not be diſcharged, becauſe they might have pleaded this matter *in abatement*, like the caſe of *Day v. Guildford* *(a)*; which was tenant for life, remainder to his iſſue in tail, the tenant for life acknowledged a ſtatute, and died; then the cognizee brought a *ſcire facias* againſt the heir, who was the iſſue in tail, and the ſheriff returned *ſcire feci*; and thereupon judgment was had againſt him; and being turned out of poſſeſſion of the lands

(a) 1. Lev. 42. S. C. 1. Sid. 54. S. C. Ray. 19.

ATWOOD *againſt* BEACH.

by virtue of that judgment, he brought an ejectment, &c.; and it was adjudged, that he was bound by the execution, and that he had no remedy either by *ejectment*, or by * *writ of error*, or by *audita querela*, or by any other means, but only by action againſt the ſheriff for a *falſe return*, if it was ſo, becauſe it was his own fault, by not pleading to the *ſcire facias*, that he was the iſſue in tail, after the ſheriff had returned him "warned."

* [114]

Caſe 77.

The King *againſt* The Mayor of Tenterden.

The Court will grant an information againſt a mayor, for the purpoſe of trying a corporate right.

A RULE was made for THE MAYOR to ſhew cauſe why an information ſhould not go againſt him, for taxing ſeveral perſons who lived out of the corporation to be contributory to building a bridge, and other charges within THE CORPORATION.

The mayor ſhewed for cauſe, that though the perſons thus taxed did not live within THE CORPORATION, yet they dwelt within *the liberties* thereof, and were intitled to the like privileges of thoſe who lived within THE CORPORATION; one whereof was to be exempted from all taxes in the county at large, ſo that it is reaſonable they ſhould be contributory to the charges within THE CORPORATION, when they had the benefit of the privileges thereof; beſides, the tax now in queſtion had been paid by ſuch out-dwellers time out of mind.

But THE COURT directed, that this matter ſhould be tried upon an information, and that for two reaſons; the one, becauſe a ſingle perſon might not be able to conteſt this matter in an action againſt the whole corporation; and the other, becauſe if a verdict ſhould paſs for or againſt ſuch ſingle perſon, it would not end the conteſt which might happen againſt the reſt.

* [115]

Caſe 78.

Hodgkins *againſt* Corbett.

The *city of London* have cognizance of theſe words, "Thou "art a *cuckoldly* "old dog, call "down the *bitch* "your wife," for they are tantamount to calling her "a "*whore*;" and therefore on a ſuggeſtion that they were ſpoken in *London*, the *ſpiritual court* ſhall be prohibited from proceeding on them.—S. C. 1. Stra. 545. Poſt. 176. Stra. 471. 555. Andr. 300. Fort. 347. 2. Wilſ. 62. 4. Bac. Abr. 521. 4. Burr. 2032. 6. Com. Dig. "Prohibition" (G. 14.). 2. Term Rep. 473.

LIBEL in the ſpiritual court for theſe words, "Thou art a "cuckoldly old dog, call down the bitch your wife."

And now upon a motion for A PROHIBITION, the ſuggeſtion was, that there is a cuſtom in *London* to puniſh whores by carting and whipping them; and that the ſaid words are actionable there by the cuſtom of the place, and avers, that if the words ſet forth in this libel were ſpoken, it was in *London*, in the pariſh of, &c. and though the plaintiff might have a remedy at law againſt the now plaintiff in the prohibition, for ſpeaking the ſaid words, yet he had exhibited a libel, &c.

And upon this ſuggeſtion *a prohibition* was granted.

* IT WAS NOW MOVED *for a conſultation*, that admitting theſe words were ſpoken in *London*, yet they are not actionable there by

the

the cuſtom of the city, becauſe the cuſtom extends only to ſuch words which are directly defamatory, and not to ſuch which are ſo by implication; and to prove this matter, the caſes in the margin were cited (*a*). The caſe of *Houblon v. Milner* (*b*), reported in *Lutwyche*, was for calling a man's wife "*a common woman*;" and there was the like ſuggeſtion, as in this caſe, for a prohibition, but it was denied, and a conſultation granted; and the reaſon there given is, becauſe the cuſtom of *London* extends only to calling a woman "*whore*," and not to ſuch words from which it may be collected ſhe is ſo. The words are uncertain, becauſe the huſband might be *a cuckold* by a former wife, and not by the plaintiff: ſo that if the words are not actionable by the cuſtom of *London*, the ſuit in the ſpiritual court muſt proceed.

NORTHEY, *contra*. The caſe of *Houblon v. Milner* has been denied for law (*c*), wherever the huſband and wife libel for words ſpoken of the wife: all the latter authorities are, that an action lies in *London* for words tantamount to calling a woman "whore:" and prohibitions have been accordingly granted. In the caſe of *Gibbons v. Harwood* (*d*), the plaintiff being a ſingle woman libelled in the ſpiritual court for theſe words, "*ſhe is with child*;" a prohibition was moved for and granted upon a ſuggeſtion of the cuſtom of *London*, though the ſame objection was made; for the words are a charge of the crime of incontinence, which makes the offender liable to puniſhment by the cuſtom of *London*. In the caſe of *Milbourn v. Povey* (*e*), the plaintiff libelled againſt the defendant for calling her huſband "*cuckold*:" and there a prohibition was granted upon the ſame ſuggeſtion.

PRATT, *Chief Juſtice*. If the uncertainty of the words be an argument that no action lies by the cuſtom of *London*, the ſame argument proves that they are not ſuable in the ſpiritual court. It is very nice to maintain that no action lies unleſs for the word "*whore*;" if the words import a charge of incontinence, they are actionable in *London*. As to the uncertainty, the latter words, "*call down* "*the bitch your wife*," tie up the former ſo as to make them relate to the plaintiff. The caſe of *Gibbons v. Harwood* (*f*) is truly ſtated; and in that caſe Mr. DEE, *Common Serjeant*, ſatisfied us that an action lies in *London* for any words that amount to calling a woman "whore" (*g*).

(*a*) 2. Roll. Abr. 296. Cro. Car. 339. 3. Vent. 220. 1. Sid. 248.

(*b*) 2. Lutw. 1042.

(*c*) EYRE, *Juſtice*, upon the firſt argument in this caſe, ſaid that this caſe had been denied.—NOTE *to former edition*.

(*d*) Hilary Term, 12. *Ann*.

(*e*) Eaſter Term, 1. *Geo*. 1. in the king's bench.

(*f*)

(*g*) The court of king's bench will take notice of thoſe cuſtoms of the city of *London* which have been properly certified by the mouth of THE RECORDER, Blacquiere *v*. Hawkins, Dougl. 378. but the cuſtom that an action will lie for calling a woman "*whore*" has not been certified, Staunton *v*. Jones, Dougl. 380, *notis*.

EYRE,

HODGKINS *against* CORBETT.

EYRE, *Juſtice.* An action lies in *London* for words tantamount: In the caſe of *Smith v. Smith (a)* a libel was for theſe words, "*ſhe* "*was never married; what is her hopeful ſon?*" and a prohibition was granted upon a ſuggeſtion of the cuſtom of *London.*

THE COURT took time to conſider until the laſt day of the Term, when they granted *a prohibition*; for the words are a certain charge of incontinency, which are actionable by the cuſtom of *London.* The caſe of *Houblon v. Milner* is good law, for there the words were, "*thou art a common woman*;" which do not amount to calling "whore." *Milbourn v. Povey* is a caſe in point.

So in the principal caſe *the prohibition* was held good, and *the conſultation* was denied (*b*).

(*a*) Mich. Term, 11. *Will.* 3. Lockey *v.* Dangerfield, 2. Stra. 1106.
(*b*) See Vicars *v.* Worth, 1. Stra. 471. Theyer *v.* Eaſtwick, 4. Burr. 2032.

Caſe 79.

Lowther and his Wife *againſt* Kelly.

In an action of covenant by huſband and wife, if the death of the wife *puis darrein continuance* be pleaded in abatement, the Court will not quaſh the plea; but the plaintiff may proceed by ſuggeſting the death on THE ROLL.

MR. LOWTHER, the now plaintiff, being ſeiſed of the lands in right of his wife, gave, whilſt he was in *Barbadoes*, a letter of attorney to *W. R.* empowering him to demiſe the land. *W. R.* by virtue thereof, and the power therein given, by indenture in his the ſaid *W. R.*'s own name, made a leaſe of a houſe to the defendant, rendering rent to the plaintiffs, in which leaſe *Kelly*, the defendant, covenanted with the plaintiffs to pay the rent.

And now in an action of covenant brought upon this indenture by *Lowther* and his wife, who were no parties to the indenture, the breach aſſigned was, for non-payment of rent, &c.

But the wife having died ſince the *laſt continuance*, the defendant pleaded that matter *in abatement.*

Ld. Ray. 1418. 1. Stra. 705. 1. Com. Dig. "Abatement" (H. 33).

Verdict for the plaintiff, and motion in arreſt of judgment.

IT WAS INSISTED *for the plaintiff*, that the action ſurvives, by ſuggeſting the death of the wife upon THE ROLL; and this is by virtue of the ſtatute 8. & 9. *Will.* 3. c. 11. by which it is enacted, "That where there are two or more plaintiffs or defendants, and "one or more of them ſhall die, &c. the writ or action ſhall not "abate, but ſuch death being ſuggeſted on the roll, the action "ſhall proceed," and therefore this plea in abatement ought to be quaſhed.

[116] * But THE COURT would not quaſh it upon a motion.

THE PLAINTIFF therefore ſuggeſted this matter on THE ROLL according to the ſtatute, and ſo proceeded in the action.

THE

THE QUESTION upon the pleadings was, Whether the plaintiff could maintain an action of covenant upon this indenture?

If *A.* being ſeiſed of lands, give a letter of attorney to *B.* to make leaſes, and he grant a leaſe to *C.* in his own name, in which *C.* covenants to pay the rent to *A.*; *Quere*, Whether *A.* can maintain an action of covenant againſt *C.* on this deed?

IT WAS ARGUED that he could not, becauſe he was not a party to the deed, but a mere ſtranger to it; and the reſervation of the rent was to a ſtranger, and ſo was the covenant to pay it; and ſuch a covenant cannot be good to one who is no party to the deed (*a*). Therefore he who has a letter of attorney to act for another, if he make a leaſe in his own name (as was done in this caſe) ſuch leaſe is void, for it ſhould be made in the name of him who gave the power and commiſſion to act in his behalf (*b*). It is true, in *a deed-poll* there may be a covenant in behalf of a third perſon, but not in *an indenture*; therefore where there is a covenant between *A.* and *B.* that ſuch a ſum of money ſhall be paid to *C.* this is not good (*c*): ſo that this being a covenant or contract in an indenture, no man can take advantage of it but he who is a party to it. The maſter cannot have an action againſt the defendant for hiring his ſervant to work with him (the defendant), without ſhewing that the contract was made with him (the plaintiff). So where the cattle of the maſter were ſold by his ſervant, and a bond taken in the ſervant's name for payment of the money, but to the uſe of the maſter, and he brought the action upon this bond, it was adjudged that it would not lie (*d*), becauſe he was no party to the bond; for he could not releaſe it. So where one *Parry* was indebted (*e*) both to the plaintiff and the defendant, and *W. R.* was indebted to *Parry*, and the defendant promiſed that in conſideration *Parry* would permit him to ſue the ſaid *W. R.* he would pay the debt due to the plaintiff, and upon an action on the caſe brought on this promiſe, and *non aſſumpſit* pleaded, the plaintiff had a verdict, but could never get judgment, becauſe he was a ſtranger to the conſideration; and in this caſe it was laid down for a rule, that no perſon ſhall recover upon an agreement but he who is party or privy to the conſideration thereof; therefore where a man promiſed the father to pay his daughter forty pounds (*f*) at or upon her marriage-day, and ſhe afterwards * married, and the huſband and wife brought the action for the forty pounds, it was adjudged, that it would not lie, but that the father alone, to whom the promiſe was made, ſhould bring the action.

5. Com. Dig. "Pleader" (2. V. 2.).

2. Lev. 744

* [117]

ON THE OTHER SIDE *it was argued* in behalf of the plaintiff, that there is no reaſon why a perſon with whom a covenant is made ſhould not be intitled to an action for breach thereof, though he be no party to the deed. The rule of law is, that no perſon

(*a*) Co. Lit. 52.

(*b*) See Moor, 818. 9. Co. 77. a. and the caſe of Frontin *v.* Small, 2. Ld. Ray. 1418. S. C. 2. Stra. 705. where it is adjudged accordingly.

(*c*) Co. Lit. 47. 2. Roll. Abr. 448. 450. 453.

(*d*) Cro. Jac. 653. See alſo Offley *v.* Ward, 1. Lev. 235. Gilly *v.* Copley, 3. Lev. 138.

(*e*) Bourn *v.* Maſon, 1. Vent. 6.

(*f*)

can

LOWTHER AND HIS WIFE *againſt* KELLY.

can take an eſtate *in præſenti*, unleſs he be a party, and yet if ſuch intereſt paſs by way of uſe, he may take without being party. There are many reſolutions in parallel caſes to ſupport this action; as for inſtance, the caſe *Dutton v. Ingram* (*a*), which is reported in ſeveral books, and was thus: The plaintiff declared, that his father-in-law being ſeiſed in fee, &c. and being about to fell timber to raiſe a portion for his daughter (who was the plaintiff's wife), the ſon and heir on whom the lands would deſcend after the death of the father, promiſed the father, that in conſideration he would forbear to cut down the timber, he the ſon (the now defendant) would pay the daughter one thouſand pounds, and for non-payment of this money the action was brought by the huſband and wife, and they had a verdict and judgment; but upon a motion in arreſt of this judgment it was objected, that this action ought to have been brought by the father, to whom the promiſe was made: to which it was anſwered, that though the promiſe was made to him, yet he was not concerned in the meritorious act; and that there being ſuch a nearneſs of relation between the father and the daughter whom the plaintiff had married, that he the plaintiff is now concerned in the very promiſe made to his father-in-law. So where the father of a young woman (*b*) promiſed the father of a young man, that in conſideration he would ſettle ſuch a jointure on her, he (the father) would give his ſon two hundred pounds more upon his marriage with the daughter; in this caſe it was adjudged, that the ſon though he was a ſtranger to the promiſe (for that was made to his father) might bring the action, becauſe the meritorious act was done by him, *viz.* the marrying the daughter; but in the caſe of *Maſon v. Bourn* (*c*), before-mentioned, the plaintiff did nothing of any trouble to himſelf, or of any benefit to the defendant. So where the defendant promiſed the plaintiff (*d*), who was a phyſician, that if he performed ſuch a cure, he would give him (the phyſician) ſo much money, and ſo much to his daughter, it was adjudged, that the daughter might bring an action for her money, though ſhe was a ſtranger to the promiſe, and likewiſe to the conſideration, becauſe
*[118] the nearneſs of * relation between father and daughter gives her the benefit of the conſideration for her father's performance.

PRATT, *Chief Juſtice.* By a *deed poll* a man may demiſe to or covenant with another perſon, and an action lies; and yet there are no parties to ſuch deed.

EYRE, *Juſtice.* Every contract is made between parties: a letter of attorney may be contained in an indenture without making the attorney a party, becauſe in that caſe no intereſt paſſes to the attorney.

Adjournatur.

(*a*) 1. Vent. 318. 2. Lev. 210. Raym. 302. T. Jones, 102.
(*b*) Lenn *v.* Hayes, Moor, 550.
(*c*) 1. Vent. 6.
(*d*) T. Raym. 67.

Smith

Smith *againſt* Jones.

Caſe 80.

Error in the exchequer-chamber will not lie upon a judgment in ejectment againſt the *caſual ejector*.

THE PRACTICE of the court of king's bench is, for the plaintiff in ejectment to deliver a copy of the declaration to the tenant in poſſeſſion, or to his wife, with an indorſement in *Engliſh* of the ſubſtance of ſuch declaration, &c. and if the tenant do not appear in the beginning of the next Term, then, upon affidavit made of the delivery of the copy of the declaration affixed to ſuch affidavit, and of reading the indorſement, or of acquainting the tenant with the contents thereof, the Court will make a rule for the tenant to appear and plead on a certain day; at which time, if he appear, he muſt, by his attorney, file common bail, and enter into a rule to confeſs *leaſe*, *entry*, and *ouſter*, and leave it at a Judge's chamber, and give notice thereof to the attorney for the plaintiff, that he may proceed. But if the tenant in poſſeſſion do not appear, then after the day appointed by the Court for his appearance, and to plead, judgment by default ſhall be entered againſt the caſual ejector.

IN THIS CASE, a declaration in ejectment was delivered, and a rule made for the tenant in poſſeſſion to appear and plead, which he did, &c. (*a*) and afterwards withdrew his plea, and confeſſed judgment, which the plaintiff entered againſt the caſual ejector.

And now the tenant in poſſeſſion moved by his Counſel to ſet aſide this judgment.

The reaſon was, becauſe he might bring a writ of error, for no ſuch writ would lie on a judgment againſt the caſual ejector, therefore the judgment ought to be entered againſt the tenant himſelf; for wherever the defendant is in court, the judgment muſt be entered againſt him, and not againſt the caſual ejector; now here he was in court, for he appeared and pleaded to iſſue, and might come in at any time, and confeſs *leaſe*, *entry* and *ouſter*, &c. And if the judgment had been entered againſt the tenant, it had been better for the plaintiff than to have it entered againſt the caſual ejector, becauſe in ſuch caſe the plaintiff will have his coſts, and will be entitled to an action to recover the value of the * meſne profits in damages, which he can never recover by a judgment againſt the caſual ejector. * [119]

THE COURT enquired of the maſter of the office, what was the practice of the Court in ſuch caſes; and both he and ſeveral old practitioners affirmed, that the practice was to enter judgment againſt the caſual ejector, and that he had often denied to ſign

(*a*) *Quære*, Whether he pleaded "not "guilty," and then withdrew his plea; or, whether the plaintiff's attorney made up the paper-book with "not guilty;" and when he came to deliver it to the defendant's attorney, he refuſed to plead "not guilty," and ſtruck it out of THE PAPER-BOOK, and gave a *cognovit actionem* with judgment againſt the tenant in poſſeſſion, at the ſame time giving notice of a writ of error brought in the name of the tenant in poſſeſſion.—NOTE *to the former edition.*

judgment

SMITH *against* JONES.

judgment againſt the tenant in poſſeſſion, unleſs he had pleaded; if is true, he pleaded in this caſe, but afterwards he withdrew his plea; and though he had pleaded, yet he is not a defendant until he enters into a rule to confeſs *leaſe*, *entry* and *ouſter*, for then, and not before, he is a complete defendant, and may plead to iſſue; but whether he appears or not, yet judgment ſhall be entered againſt the caſual ejector; it is true, it is ſometimes entered againſt the tenant in poſſeſſion, but that is by conſent of the parties, and upon a promiſe not to bring a writ of error.

THE CHIEF JUSTICE was of opinion, that there was no inſtance of a judgment being taken againſt the tenant in poſſeſſion for want of a plea; that words of the rule are poſitively certain that judgment ſhall be entered againſt the caſual ejector. He was doubtful in this point. It is the right of the ſubject to give judgment by confeſſion. It is likewiſe his right to bring a writ of error upon ſuch judgment, of which right he cannot be deprived by a rule of this court, or by any other court whatſoever. Now the intent of the rule, for the tenant in poſſeſſion to appear on a certain day, and plead, is only to bring him into court, that when he comes in, he may confeſs *leaſe*, *entry* and *ouſter*, but not to ſtrip him of that right to which he is entitled by law, as it will if this judgment ſhould ſtand againſt the caſual ejector, becauſe no writ of error will lie in THE EXCHEQUER-CHAMBER upon ſuch judgment. This way of delivering an ejectment is in nature of proceſs to compel the tenant to appear in court, and was firſt inſtituted in the Lord Chief Juſtice *Roll*'s time, and never queſtioned until now. There is a difference between appearing and pleading, and appearing and not pleading at all.

EYRE, *Juſtice*, was clear for the plaintiff, that judgment ſhould be entered againſt the caſual ejector, but the other three were doubtful.

So it was adjourned.

Caſe 81. The King *againſt* The Inhabitants of the County of Surrey.

Information for not repairing a county bridge.

UPON A MOTION made to diſcharge a rule for AN INFORMATION againſt the inhabitants of the county of *Surrey*, for not repairing a bridge;

IT WAS ALLEGED, that the pariſhioners of *Mitcham* in that county ought to repair it, which they had done time out of mind. It is true, that *pariſh* had obtained a verdict againſt *the county*, but it was by ſurprize; * for by certificates and other records of the ſeſſions, it will appear that this pariſh ought to repair this bridge, and that they had been fined for not repairing; and that they had acquieſced under that charge many years.

* [120]

THE KING *againſt* THE INHABITANTS OF THE COUNTY OF SURREY.

IT WAS INSISTED *for the pariſh*, that admitting they had repaired this bridge, yet if they were not obliged ſo to do, either by *preſcription* or *tenure*, they ſhall not always be liable. They cannot be obliged by *preſcription*, becauſe the inhabitants of this pariſh are not a body politick, and it is not pretended that they are obliged by *tenure*.

TO WHICH *it was anſwered*, that an information againſt the county in general was the only way to try the right; for though this pariſh might not be obliged to repair the bridge, yet ſome other pariſh might; and ſince the county is *primâ facie* bound to repair it, it is probable that when the information is exhibited againſt them, the inhabitants of *Mitcham*, to excuſe themſelves, may ſhew who is obliged to repair it.

And THE COURT being of that opinion, the rule was made abſolute.

Moſſe *againſt* Bennet. Caſe 82.

TRESPASS ON THE CASE againſt the defendant, for diſturbing the plaintiff in his common; wherein he ſet forth, that the defendant had covered three acres of the common field with hurdles, and had incloſed three acres more, &c.

A juſtification in treſpaſs, ſtating that *A.* was *ſeiſed in fee* of the place WHERE, and made a *leaſe for life* thereof to the defendant, by virtue of which he entered, &c. is good. 1. Bac. Abr. "Common" (C.).

The defendant pleaded, that THE COLLEGE of *Newelme*, in the county of *Oxford*, was ſeiſed in fee of the lands in the declaration mentioned, and being ſo ſeiſed, made a leaſe thereof to the defendant for life, and that he (the defendant) had a right by preſcription to have A FAIR on the ſaid common every year on ſuch days in the year, and to have hurdles to keep and incloſe cattle there, and a right to ſo much ground on the ſaid common as would keep the ſaid hurdles from fair to fair, and ſo juſtifies the incloſing three acres with hurdles, and the covering three acres *cum cratibus prædict.* and avers it to be the ſame treſpaſs.

And upon a demurrer to this plea,

IT WAS OBJECTED, that it was ill and repugnant, becauſe a *ſeiſin in fee* was laid in THE COLLEGE, and an eſtate for life in the defendant.

But it was diſallowed; for it is good *reddendo ſingula ſingulis*.

A juſtification in treſpaſs for incloſing three acres and *covering* three acres, muſt ſay that the covering was *in aliis tribus acris*.

THEN IT WAS OBJECTED, that the defendant had juſtified the incloſing three acres, and the covering three acres, but did not ſay, that the covering was *in aliis tribus acris*, ſo that the plaintiff having declared for a diſturbance in ſix acres, * the defendant had only juſtified in three acres.

THE COURT held this to be a fault incurable; and the rather, becauſe this being an action on the caſe for diſturbing the plaintiff in the enjoyment of his common, the defendant might have pleaded the *general iſſue*, and have given this *ſpecial matter* in evidence.

EASTER

EASTER TERM,

The Ninth of George the First,

IN

The King's Bench.

1722.

Sir John Pratt, *Knt. Chief Juſtice.*

Sir Lyttleton Powis, *Knt.*
Sir Robert Eyre, *Knt.*
Sir John Forteſcue Aland, *Knt.* } *Juſtices.*

Sir Robert Raymond, *Knt. Attorney General.*
Sir Philip Yorke, *Knt. Solicitor General.*

Sir Alexander Anſtruther *againſt* Chriſty. Caſe 83.

Writ of error no *ſuperſedeas*, unleſs the plaintiff in error put in bail. S. C. Bunb. 178.

AN ACTION OF DEBT was brought in the court of common pleas upon a contract for payment of money on SOUTH-SEA ARTICLES, at the end whereof the parties bound themſelves to each other in ſuch a ſum, for the true performance thereof, &c. The plaintiff had judgment.

The defendant brought a writ of error in the king's bench.

The plaintiff in the action inſiſted, that this writ of error was no *ſuperſedeas* to the execution on the original action, unleſs the plaintiff in error had put in bail according to the ſtatute 3. *Jac.* I. c. 8. Now as to that matter, it is true, that he did put in bail, but the plaintiff in the original action excepted againſt them as inſufficient; and nothing farther was done in order to juſtify them, or to put in other bail; and certainly he ſhall not be concluded by the giving inſufficient bail, as they on the * other ſide would have it; and compared it to the caſe of *Reeve v. Pike* (*a*), * [122]

SIR ALEXANDER ANSTRUTHER *againſt* CHRISTY.

where, after the defendant had put in bail, he moved that they might be diſcharged; but it was denied. Now this being an action of debt founded on a contract for payment of money; therefore by the very words of the ſtatute *bail* is requiſite on a writ of error of the judgment on ſuch action, otherwiſe that writ is no *ſuperſedeas* to the execution. It is requiſite on an action of debt on a *nomine pœnæ* in a leaſe, though it is otherwiſe in replevin or covenant; and the reaſon why it is not required of an executor who brings a writ of error, is not becauſe it is not requiſite in the original action, but becauſe they are ſuppoſed to be ignorant of the eſtate of the teſtator.

ON THE OTHER SIDE *it was argued*, that this writ of error was a good *ſuperſedeas*, and that it is not neceſſary to put in bail on ſuch a writ, it being brought on a judgment obtained on a bond for non-performance of covenants (*a*); for wherever the debt is not directly due on the bond, or any other agreement, but accrues upon the non-performance of ſomething collateral to that on which the action is founded, there no bail is requiſite (*b*); and this is a bond for payment of money for non-performance of articles; it is true, the bond itſelf is included in the very articles, but there is no material difference between ſuch an obligation and a bond or note, with a condition for performance of articles; for wherever the action is founded on the articles, there bail is not requiſite; and ſo is the caſe of *Biddolph v. Temple* (*c*).

THE COURT. The ſtatute requires, that where an action is brought on a ſingle bill or bond, or contract for payment of money only, that in ſuch caſe bail ſhall be given; which implies, that it is not requiſite in any other bond or contract: it is true, this is a contract, but it is not for payment of money only, but to pay it upon non-performance of an agreement, and ſo not within the proviſion of this ſtatute. But though bail be not requiſite to the original action, yet it muſt be given upon a writ of error of a judgment obtained in ſuch action; as for inſtance, if an action ſhould be brought in the court of king's bench for five pounds, there bail is not required; but if judgment be obtained in that action, and a writ of error brought, certainly bail muſt be put in.

So judgment was given, that this writ of error was no *ſuperſedeas*, unleſs good bail was put in.

(*a*) 2. Bulſt. 53. Yelv. 227.
(*b*) Cro. Jac. 350. Cro. Car. 509.
(*c*) 1. Lev. 260.

The

* The King *againſt* Wiatt.

Caſe 84.

UPON A MOTION for *an attachment* againſt the defendant for publiſhing a libel againſt *a doctor of divinity* in the univerſity of *Cambridge*, a rule was made upon him to ſhew cauſe on ſuch a day why it ſhould not be granted.

If a rule for an information be granted againſt the *printer* and *publiſher* of a libel, and the *author* appears and avows himſelf, the Court will diſcharge the rule againſt the *printer* and *publiſher*, and direct it againſt the *author*.

He now moved by his Counſel to diſcharge that rule, upon an affidavit that his fault was not wilful, but merely through ignorance; that he had the libel from one *Crownfield*, a printer in *Cambridge*; that it was in *Latin*, which the defendant did not underſtand, and that he did not know who was the author, otherwiſe than by a letter which he received from the printer, and which was now annexed to his affidavit, by which letter it appeared, that one *Dr. Middleton* was the author: ſo that having ſhewed how he came by this libel, and having told all that he knew of the author, for that reaſon it was inſiſted in his behalf, that the rule ſhould be diſcharged, and that the printer ſhould be proſecuted.

But the rule was continued on the defendant until he made out his allegation againſt the printer, who was therefore joined in the rule, that both of them might be before the Court.

In the next Term *Dr. Middleton (a)* appeared, and confeſſed in court that he was the author of the book.

And thereupon the rule was diſcharged againſt *the defendant* and *the printer*; and *the doctor* was committed until farther conſideration of the matter.

And within a few days afterwards he was brought into court, and fined fifty pounds, and bound to his good behaviour for a year.

And ſo was *Dr. Colbatch* the ſame Term, for the like offence.

(a) See Forteſcue Rep. 201.

Goodright *againſt* Opie.

Caſe 85.

EJECTMENT. Upon *not guilty* pleaded, the jury found the defendant *not guilty* as to part, and as to the other part there was a ſpecial verdict, the ſubſtance whereof was thus:

If a teſtator deviſe "*all* his "lands *in fee* to "*A. B.* and *C.* "as tenants in "common, and "*all* his other "lands not be-"fore bequeathed, and *all* his money, houſehold goods, plate, and all his eſtate real and perſonal, "of what nature or kind ſoever, to *D.* and *E.* in fee;—*Quære*, If *C.* die in the life of the teſtator, whether the lapſed third part of his eſtates in fee ſhall paſs to *D.* and *E.* as *reſiduary legatees*, or to the *heir at law* of the teſtator?—12. Mod. 592. 1. Wilſ. 333. Cowp 299.

The teſtator being ſeiſed in fee of ſeveral lands, did, in the year 1705, deviſe "*all* his ſaid lands" to five perſons (naming them), and to their heirs, as *tenants in common*; that *John Paine*, one of

GOODRIGHT *againſt* OPIE.

the ſaid deviſees, died two years before the teſtator, * who, by another clauſe in the will, deviſed "all his *other* meſſuages, lands, "&c. not therein before given, deviſed, or bequeathed," and "*all* his money, houſehold goods, plate, rings, &c." and "*all* "his eſtate real and perſonal whatſoever, of what nature or kind "ſoever," to his two nieces *Mary Buce* and *Mary Opie*, their heirs, executors, and adminiſtrators; that the teſtator died without making diſpoſition of the ſaid fifth part of his lands, otherwiſe than by his laſt will as aforeſaid.

The queſtion was, Whether the ſame ſhould deſcend to the heir at law of the teſtator, as not being diſpoſed by him in his life, becauſe the deviſee died before him; or, Whether it ſhould paſs to *Buce* and *Opie* as reſiduary legatees by the latter clauſe of the will, as an eſtate not before diſpoſed by the teſtator?

THOSE WHO ARGUED *for the leſſor of the plaintiff*, who was heir at law, inſiſted, that this fifth part of the lands ſhould deſcend, becauſe it could not paſs by any poſſibility to the firſt deviſee, for he was dead before the teſtator; therefore it muſt neceſſarily reveſt in him, and by conſequence muſt deſcend to his heir at law; that there is no caſe wherein it has been reſolved, that a reſiduary legatee in a will ſhall carry the lands which have been before diſpoſed by the ſame will, though it ſhould happen that they cannot paſs to the firſt deviſee, either by reaſon of death or any other incapacity; that wills are commonly guided by the intention of the teſtator, and that there was not a word in this will which ſhewed he intended theſe lands ſhould paſs to the reſiduary legatees; neither is it pretended by them that he knew the firſt deviſee was dead. Now it is a ſettled rule in the conſtruction of wills, that both as to the perſons taking, and as to the eſtates which they take, all muſt ariſe from the intention of the teſtator, which intention muſt be collected out of the words of the will itſelf: now here are no words in this will which import that the teſtator intended theſe lands ſhould paſs to reſiduary deviſees. This being premiſed, and it plainly appearing by the firſt clauſe of this will that the teſtator had diſpoſed "all his lands," therefore the words "real and "perſonal eſtate," in the laſt clauſe, ſhall be intended a deviſe of his chattels real; for it is abſurd to ſay, that what he had before deviſed to one in fee ſhould go over to another *(a)*. Beſides, he having deviſed "all other his real and perſonal eſtate not before "deviſed," there the word "other" is a relative, and cannot refer to any lands before given, but makes that clauſe as ſtrong as if he had excepted the lands before deviſed, by particularly naming
* [125] them, becauſe there muſt be * *other lands* to ſatisfy that word, and which were not deviſed before; but the lands now in queſtion were deviſed before. But admitting it to be the intention of the teſtator, that the fifth part of his lands ſhould paſs to the reſiduary legatee, yet if the words in the will be not apt for that purpoſe,

(a) See the caſe of Wilkinſon v. Maryland, Cro. Car. 447. 449.

thoſe

thoſe lands will not paſs; and ſo it was reſolved in the caſe of *Steed v. Berrier* (*a*). The caſe which comes neareſt this point, and which probably may be objected on the other ſide, is the caſe of *Wheeler v. Watſon* (*b*): The teſtator deviſed a manor to *T. S.* for ſix years, &c. and afterwards by the ſame will he deviſed "all the "reſt of his lands in *Somerſetſhire*, or elſewhere, to his brother "and his heirs;" it was adjudged, that the reverſion after ſix years paſſed; but in that caſe, and ſome other of the like nature (*c*), it appears in the wills themſelves, that the teſtators had other eſtates to diſpoſe, and that they uſed ſufficient and apt words to paſs them.

S. C. cited in 3. Mod. 228. 6. Mod. 111. 2. Ventr. 286. Forteſc. Rep. 227. 229. 3. Wil. Rep. 63.

E contra. The queſtion was truly ſtated on the other ſide, *viz.* whether the fifth part of the teſtator's lands ſhould deſcend to the heir at law, or paſs over to the reſiduary deviſees as not diſpoſed before, becauſe *John Paine*, one of the five deviſees, died in the life-time of the teſtator, and by conſequence it could not paſs to him; but it ſeems plain, that it ſhall paſs to the reſiduary deviſees by the laſt clauſe of this will, becauſe at that very time when it was made it was not diſpoſed to any other perſon whatſoever; for it was then the eſtate of the teſtator, and could not be the eſtate of *John Paine*, becauſe he was then dead; therefore it muſt neceſſarily paſs by the laſt clauſe in the will, as the real eſtate which the teſtator then had, and which he had not diſpoſed before. As to the word "other," it is reſtrained to that very clauſe by which the teſtator deviſed his chattels, and cannot refer to a deviſe of his real eſtate of any kind whatſoever, becauſe it was a deviſe to the reſiduary deviſees and their heirs; now it had been in vain for the teſtator to have mentioned the word "heirs," if he had not intended the lands ſhould paſs to them. And as to ſuch intention, it may reaſonably be collected out of the words of this will, that he did intend they ſhould paſs; for otherwiſe he might eaſily have worded the clauſe in this manner, "and all other my "real and perſonal eſtate not before-mentioned,' inſtead of "not "before * diſpoſed;" ſo that his intention ſeems to be, that if, by any accident interpoſing, his land ſhould not paſs to the firſt deviſees, then they ſhould paſs over to the ſecond deviſees, as a *reſiduum* not before diſpoſed. And though probably a lawyer might have uſed other words than the teſtator had done in this will, yet that is not to be conſidered where his intention is ſo plain; for if the form is not good, yet his intention being clear that will help the form; but in this caſe the whole will is good and formal, and there is no room to object that it is not ſo. It is true, it was objected by the Counſel for the plaintiff, that it is abſurd to ſay, that after the teſtator had deviſed his lands to one in fee, that they ſhould go over to another; but this is miſrepreſenting the caſe; for it is no otherwiſe to go over than in caſe any accident ſhould happen, that they ſhould not paſs to the firſt ſpeci-

*[126]

(*a*) Raym. 408. Vent. 341. 2. Mod. 313.

(*b*) Allen, 28.

(*c*) 1. Lev. 213. 1. Saund. 180. 2. Vent. 285.

GOODRIGHT *againſt* OPIE.

ſic deviſee; as if the teſtator ſhould deviſe a particular ſum of money to one, and all the reſt of his perſonal eſtate to another, and it ſhould happen that this particular legacy could not paſs to that legatee, ſhall not the reſiduary legatee have it before the executor? Certainly he ſhall; and yet in that reſpect the executor has the ſame right to chattels as the heir has to lands; and as for caſes, there are none in point.

THE COURT. An *executor* has not the ſame right to the perſonal eſtate as the *heir at law* has to lands, becauſe an executor is no more than a truſtee made by the teſtator (*a*), but an heir is to ſit in the ſeat of his anceſtor. But as to the principal matter, if a particular eſtate for life had been deviſed to *John Paine* (who died), with remainder over, ſuch a remainder had been good; and ſo is *Perkins*, 108. *b.* 109. *a.* and ſo ſhould this; and there is no objection againſt it, but that it does not appear in the will that the teſtator had anything to diſpoſe, he having deviſed "*all* his "lands" before, by the firſt clauſe in his will, to five perſons and their heirs.

No judgment was given (*b*).

(*a*) See the caſe of Sir Richard Raines, Carth. 458. Warrington *v.* Langham, Prec in Chan. 90. Nicholas *v.* Nicholas, Prec. in Ch. 547. and 11. Mod. 162. accordant.

(*b*) See the caſe of Wright *v.* Horne, poſt. 821.

* [127]

Caſe 86. *The King *againſt* Mayor and Burgeſſes of Tregony, &c.

Previous to 11. *Geo.* 1. c. 4. ſ. 1. if a particular day was appointed by the charter of a corporation for the election of a mayor or other corporate officer, with a power of holding over, they could not proceed to ſuch election on any other day in the year, except on *the death* or *removal* of the mayor for the time being.

S. C. ante, 111. Poſt. 132. Stra. 394.

A MANDAMUS was directed "To the mayor and burgeſſes "of *Tregony*" to chooſe A MAYOR, and ſwear him into that office. They return, that the borough of *Tregony* was incorporated by letters patent of king *James the Firſt*, by which it was provided, that the mayor and burgeſſes ſhall for ever after proceed to elect a new mayor on the *Tueſday* next after *Michaelmas-day* every year, and that the new mayor thus elected ſhall be ſworn by the mayor in being before he goes out of his office, and that every mayor ſo choſen ſhall continue in that office until another be duly elected in manner as aforeſaid; and they farther returned, that the day of election appointed by their charter being paſt, they could not proceed to a new election, unleſs on the death or removal of the preſent mayor, &c.

IT WAS INSISTED for a *peremptory mandamus*, that they might proceed to a new election, though the day for that purpoſe, appointed by their charter, was paſt, becauſe that day was only directory; for if the mayor ſhould be ſick on that day, or out of town, yet they might proceed to elect a new mayor at any other time. In the caſe of *Hicks v. the Town of Launceſton* (*a*), in *Cornwall*, it was held, that if the king incorporate a town by the

(*a*) In the king's bench, in Eaſter Term, 8. *Car.* 1. 1. Roll. Abr. 514.

name

name of "mayor and eight aldermen," with a clauſe in the letters patent, that upon the death or removal of any alderman it ſhall be lawful for the mayor and the reſt of the aldermen, within eight days after ſuch death or removal, to elect another alderman in his place, they may, though no election be within the eight days, chooſe another at any time after, becauſe ſuch a power is incident to the corporation created; and the affirmative power which they have by the charter itſelf to chooſe within eight days, &c. does not take away the power which they have by implication as incident to the corporation.

ON THE OTHER SIDE *it was argued*, that there being no exception taken to this return, it muſt therefore be good. And as to the other point, there cannot be an election but on the very day appointed by the charter, unleſs upon the death or removal of the mayor. * In theſe caſes a *mandamus* is uſually granted to fill up the body incorporated, for the ſake of the inheritance and ſucceſſion; but here the corporation is full, ſo there is no occaſion to go to a new election of a mayor. Now it being returned, that the day of election appointed by their charter is paſt, they cannot proceed to a new election, unleſs on the death or removal of the preſent mayor. If this be not true, then it ought to have been traverſed on the other ſide *(a)*; and the mayor and burgeſſes might have taken iſſue, or have demurred; and upon a verdict or judgment on the demurrer, they might have damages and coſts as in an action on the caſe; and there being neither a traverſe nor demurrer to this return, this is a good anſwer why no *peremptory mandamus* ſhall go.

* [128]

Then IT WAS OBJECTED to this firſt writ of *mandamus*, that it was not well directed; for it was, "To the mayor and burgeſſes "to elect and ſwear a new mayor;" whereas the power of adminiſtering an oath is in the mayor only. It is true, a *mandamus* is not to be ſuperſeded without a return firſt made, becauſe by a return the fact ought to appear judicially before the Court; but where there is a return, as in this caſe, and it appears that the writ is wrong directed, in ſuch caſe it ought to be quaſhed. The difference is very plain between a writ to elect and a writ to ſwear another into an office; for the one may be directed to the whole body corporate, but the other muſt be directed to him alone who hath power to adminiſter an oath, and nobody can have that power but by ſpecial words from the king. Therefore this *mandamus* cannot be good, becauſe the execution thereof would ſubject the perſon executing it to an information, for uſurping an authority where he had none.

A *mandamus* commanding the mayor and burgeſſes to elect and ſwear in is good, although the mayor alone is authoriſed to adminiſter the oath of office.

THE COURT. Here are two objections made to this *mandamus*: FIRST, that the writ is not good; and, SECONDLY, that the corporation cannot proceed to chooſe a new mayor on any other day than the very day appointed by the charter.

(a) See 9. *Anne*, c. 20. ſ. 2.

THE KING *againſt* MAYOR AND BURGESSES OF TREGONY, &c.

The objection to *the writ* is, that it is directed "To the "mayor and burgeſſes to elect and ſwear a new mayor," which is wrong; for though the mayor and burgeſſes are to elect, yet it is the mayor alone who muſt adminiſter an oath to the perſon, for the burgeſſes cannot; therefore this direction is wrong. But this may receive a very plain anſwer by a reaſonable conſtruction of the matter diſtributively in the manner as directed by the writ, the words being "*eligetis et juretis* * *ſecundum authoritatem veſtram*;" ſo that it is a writ to the body corporate to elect, they having the inheritance as to the election of a mayor; and it is a writ to the mayor, who has a ſpecial power to ſwear the perſon elected into the office; ſo that *reddendo ſingula ſingulis*, the writ is well directed. And it could not be otherwiſe, unleſs there had been two writs granted, the one to elect, and the other to ſwear the perſon elected; ſo that this being a miniſterial writ is ſo far good. It is true, all to whom the writ is directed are to do ſomething, *viz.* they are to elect, and to be preſent when the perſon elected is to be ſworn; and there is no material difference between one man being ſworn by another, and being ſworn in the preſence of another; ſo that thoſe who are preſent when the new mayor is ſworn may ſo far be ſaid to have a power to ſwear him, for the mayor himſelf does no more than being preſent, it being uſual for *the town-clerk* to adminiſter the oath.

* [129]

So that THE CHIEF QUESTION in this caſe is, that where a certain day is appointed by the charter for the mayor and burgeſſes to proceed to the election of a new mayor, and that day being paſt, whether they can elect on any other day in that year.

And THE COURT was of opinion, they could (*a*) not, unleſs upon the death or removal of the mayor in being; for if they ſhould elect on any other day, it is not *ſecundum authoritatem* given by the charter. And there can be no inconvenience if they ſhould ſtay till another day appointed by the charter for them to chooſe a new mayor, becauſe it is expreſsly provided, that the mayor elected ſhall continue in his office until another is duly choſen, which cannot be but upon the very day appointed, as aforeſaid; for where they have no power by their charter to chuſe on any other day, their corporation ſhall be diſſolved rather than they ſhould make an election on another day; and this Court cannot compel them to chuſe a mayor on any other day, where there is a mayor already in being (*b*).

So a *peremptory mandamus* was denied.

(*a*) By 11. *Geo.* 1. c. 4. f. 1. if no election ſhall be made upon the day, or within the time appointed by charter or uſage for ſuch election, the members of the corporation who have a right to vote may proceed to an election in the manner directed by the ſtatute.

(*b*) See 9. *Anne*, c. 20. f. 8.

Waller's

Waller's Caſe. Caſe 87.

THE COURT was moved to ſtay proceedings on a *ſcire facias* brought againſt the bail, there being a writ of error depending in THE EXCHEQUER-CHAMBER.

The proceedings in *ſcire facias* againſt bail ſhall be ſtayed on their confeſſing judgment, and entering into a rule to pay the debt, or deliver up the principal within four days after judgment affirmed.

THE COURT. * The rule in the caſe of *Myer v. Arthur* (*a*), upon a motion in this court in *Eaſter Term*, in the ſeventh year of *George the Firſt*, was, that if the defendants in the *ſcire facias* will confeſs judgment, and enter into a rule to pay the debt, or to deliver up the principal within four days after the judgment ſhall be affirmed, the proceedings on the *ſcire facias* ſhall be ſtayed.

THE CHIEF JUSTICE was of opinion, that the like rule ſhould be made in this caſe. It is true, the plaintiff in the *ſcire facias* is to have judgment immediately againſt the bail, but he is tied up from ſuing out execution until four days after the judgment ſhall be affirmed, and then, on non-payment of the debt, or not rendering the principal, he is at liberty to take out execution, and by this means expences will be ſaved on both ſides (*b*).

(*a*) 1. Stra. 419. Cole *v.* Buckland, 2. Stra. 873.
(*b*) See Aldridge *v.* Snowden, poſt. 331. Everett *v.* Gray, 1. Stra. 443. Richardſon *v.* Jelly, 2. Stra. 1270. Capron *v.* Archer, 1. Burr. Rep. 340.

Aldridge *againſt* Snowden. Caſe 88.

THIS was likewiſe a motion to ſet aſide a judgment againſt the bail, where the ſecond *ſcire facias* againſt them was returnable on the thirteenth day of *May*, and the writ of error was allowed on the ſame day, and notice given between three and four o'clock, the ſame day the bail ſurrendered the principal, and then judgment was obtained againſt the bail; and for an authority in point, the caſe of *Myer v. Arthur* (*a*) was cited, where it was reſolved by this Court, that after a writ of error is brought on the principal judgment, the proceedings upon a *ſcire facias* againſt the bail ſhall ſtay, and the bail ſhall have four days after the affirmance of the judgment, to render the principal, or pay the condemnation money; and upon the authority of this caſe, a rule was now made for the plaintiff to ſhew cauſe, &c. why the judgment ſhould not be ſet aſide, and all further proceedings ſtayed.

Upon another day a motion was made to diſcharge that rule, becauſe the bail ought to render the principal, &c. on the very day that the ſecond *ſcire facias* was returnable, otherwiſe the plaintiff muſt have judgment, and it ought not to be ſet aſide. It is true, the bail have brought a writ of error on the very laſt day allowed by law for them to render the principal, and gave notice thereof about three of the clock in the afternoon, but did not render the

(*a*) Eaſter Term, 7. Geo. 1. 1. Strange, 419.

principal

ALDRIDGE *againſt* SNOWDEN.

principal till nine days afterwards (*a*), which cannot diſcharge the bail; neither is it any foundation to ſet aſide this judgment againſt them.

*[131] * THE COUNSEL *for the bail* likewiſe cited the caſe of *Myer v. Arthur* to prove, that they ought to be diſcharged, for in that caſe the ſecond *ſcire facias* was returnable the thirteenth day of *February*, which was the laſt day of *Hilary Term*, and notice given, that a writ of error was allowed two days before; and the plaintiff intending to proceed on the ſecond *ſcire facias* was ſtopped upon a motion. It is true, the render of the principal on the day the ſecond *ſcire facias* is returnable, would be too late, if the writ of error did not help it; but that being brought before the return of the ſecond *ſcire facias*, the bail hath time until four days after the affirmance of the judgment.

TO WHICH *it was anſwered*, that this judgment was regular; and though, if the bail had come before the return of the ſecond *ſcire facias*, and moved the Court that proceedings might be ſtayed againſt them, there might have been ſome indulgence; but when they did not make any application till after the judgment was ſigned, it ought not now to be ſet aſide.

PRATT, *Chief Juſtice.* Application to ſtay proceedings againſt bail, by reaſon of a writ of error brought by the principal, ought to be made before judgment ſigned; for ſuch writ of error of itſelf is no *ſuperſedeas* to the proceedings againſt the bail. However, on the circumſtances of the caſe, ſince notice was given of the allowance of the writ of error, I think in reaſon and equity the judgment ought to be ſet aſide, paying coſts. The bail may ſurrender the principal at any part of the day of the return of the ſecond *ſcire facias*.—He was of opinion, that it was neceſſary to move the Court to ſtay proceedings; and if they could be ſtayed upon a motion, then if the defendants paid coſts, and the plaintiff was put in as good a condition as if the motion had been made in time, the Court may ſtay the proceedings, though the motion was made out of time; and the rather, becauſe it is againſt the bail, who ought to be favoured as far as poſſible.

FORTESCUE, *Juſtice.* Such ſurrender on the return-day of the laſt *ſcire facias* muſt be made *ſedente Curiâ*. This judgment againſt the bail is ſtrictly regular, and ought not to be ſet aſide. The ſtaying the proceedings againſt the bail, when the principal brings a writ of error, is merely an indulgence of the Court, even when the bail move in time. All the proceedings are paſt, for judgment is obtained. This caſe differs from the common motion to ſtay proceedings on the bail-bond; for that is never granted but by making the plaintiff ſecure of his debt if he recover; for the

(*a*) *Quære*, If they did not ſurrender the principal on the very ſame day, and even before judgment ſigned; but however, it is certain that the ſurrender could not be made till after the regular time allowed for that purpoſe was expired; becauſe otherwiſe this motion had been needleſs.—NOTE *to the former edition.*

judgment

judgment on the bail-bond ſtands as a ſecurity for the debt. When proceedings againſt bail are ſtayed on a motion made in proper time, if the judgment is afterwards affirmed, the bail are allowed four days to ſurrender the principal after ſuch affirmance. ALDRIDGE *againſt* SNOWDEN.

THE COURT made a propoſal to ſet aſide the judgment, if the bail would be bound to pay the debt abſolutely (without an election to pay the debt or ſurrender the principal) if the judgment ſhould be affirmed.

Which not being agreed to, the rule for ſhewing cauſe was diſcharged.

TRINITY

TRINITY TERM,

The Ninth of George the Firſt,

IN

The King's Bench.

1723.

Sir John Pratt, *Knt. Chief Juſtice.*
Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Juſtices.*
Sir John Forteſcue Aland, *Knt.*
Sir Robert Raymond, *Knt. Attorney General.*
Sir Philip Yorke, *Knt. Solicitor General.*

* The King *againſt* Alexander John.

Caſe 89.

UPON A MOTION in *Trinity Term* laſt, a rule was made for the defendant to ſhew cauſe why AN INFORMATION in the nature of a *quo warranto* ſhould not be granted againſt him, to ſhew by what authority he came to be mayor of *Leſtwithiel*, in the county of *Cornwall.*

Formerly, the Court would grant an information *quo warranto* to try *the right* by which a corporator held his office, although he had been *ſixteen years* in quiet poſſeſſion of it. Poſt. 166.

In *Hilary Term* following cauſe was ſhewn, that by the charter of incorporation a mayor is always to be elected out of the capital burgeſſes, to continue in his office until a new mayor be duly choſen; that the defendant, the preſent mayor, was never a capital burgeſs, and conſequently could never be duly choſen mayor out of thoſe burgeſſes; and therefore is no mayor.

The anſwer was, that he was choſen a capital burgeſs in the year 1697; that as many of the inhabitants as are now living ſaw he was duly elected, excepting one *John John*, who now complained againſt him; and that having ſo long acquieſced under that election, it ſhall not now be brought in queſtion, it being a ſtanding rule in caſes of this nature, that they ſhall not be examined in ſuch remote degrees; for if they ſhould, then they might enquire whether

THE KING *againſt* ALEXANDER JOHN.

ther the defendant was a freeman before he was a burgeſs, and whether he was a burgeſs before he was a capital burgeſs, which would be very inconvenient; * that the defendant was choſen mayor in the year 1706; and that the corporation, for ſome differences ariſing amongſt themſelves, did not proceed to any election of capital burgeſſes ſince that time; ſo that this borough wanted a ſufficient number of ſuch burgeſſes to elect a new mayor, and for that reaſon the defendant had continued mayor ever ſince.

PRATT, *Chief Juſtice*, was of opinion, that the fact was plain that the defendant had been mayor of this place for *ſixteen years* together, which is a ſufficient cauſe for an information (*a*); ſo that the rule was made abſolute, and the parties were left to try the right upon this information (*b*); though one of the Judges was of opinion, that a *mandamus* to elect a capital burgeſs and a mayor had been a good and proper method.

Afterwards a trial was had upon this information, and a verdict was found for the plaintiff.

IT WAS NOW MOVED to ſet it aſide, and for *an attachment* againſt *John John* for not producing the corporation-books at the trial, according to a rule of court made for that purpoſe, and with which he was ſerved (*c*).

As to the firſt part of this motion, *viz.* to ſet aſide the verdict, the Court took time to conſider it, and that FORTESCUE, *Juſtice*, would in the mean time conſult with PRICE, *Baron*, who tried the cauſe, and report his opinion; and he afterwards informed the Court, that he had ſpoke with *the Baron*, whoſe opinion was, that the verdict was not againſt evidence, but that the proof was only by one witneſs, that the defendant was a capital burgeſs duly elected; and that the evidence that it was not a due election was given by *John John* only, and no more; and that it was objected againſt his evidence at the trial, but the objection was over-ruled, and he (*the Baron*) was ſatisfied with the verdict.

4. Com. Dig. "Franchiſes" (F. 21.).

However, it was moved for a new trial, upon a ſuggeſtion that this *John John*, who was the only witneſs againſt the defendant, kept the corporation-books from him, ſo that they could not be produced at the trial, he being ſerved with a rule of this court to produce them; and it was farther moved, that *an attachment* might be granted againſt him for a contempt.

It was inſiſted, that if this verdict ſhould ſtand, a great inconvenience muſt neceſſarily follow; for it would avoid all the acts of

(*a*) The opinion of the Chief Juſtice upon this point was, perhaps, founded on an idea that the right of holding over in this caſe was affected by the ſtatute 9. *Anne*, c. 20. ſ. 8. by which it is enacted, "That no perſon to whom it belongs to "preſide at the election, and make return "of any member to ſerve in parliament, "who hath been or ſhall be in ſuch "annual office for one whole year, ſhall "be capable to be choſen into the ſame "office for the year immediately enſu-"ing."

(*b*) Poſt. 166.

(*c*) See 32. *Geo.* 3. c. 58. ſ. 3.

this

this corporation ever ſince the defendant had been mayor; for if he was not a lawful mayor, then all the corporate acts done by him are void.

THE KING *againſt* ALEXANDER JOHN.

* THE COUNSEL *on the other ſide* argued, that this was a good verdict, and given upon good evidence, and ought not to be ſet aſide, or a new trial granted, becauſe the Judge who tried the cauſe was ſatisfied with the verdict, and reported that it was given on good evidence; and that to argue a right from the long poſſeſſion of this office, when that right had been tried upon an information, and found againſt the defendant that he had no right, was a new ſort of defence, and a very ſtrange one too. It is true, the poſſeſſion might be given in evidence, that he had a right to vote as mayor, &c. becauſe every officer *de facto* has ſuch a right; but certainly his right to the office itſelf can never be determined upon a trial of his right to vote as mayor. It is true, there was a rule made for this *John John* to produce the corporation-books at the trial; but as to that matter he has poſitively made oath, that he hath not thoſe books, and that he does not know who hath them, and therefore he ſhall not be in contempt without a wilful default.

* [134]

THE COURT. There is no room for *an attachment*, becauſe this perſon has not diſobeyed the rule, and *a new trial* ſhall not be granted, becauſe that would be againſt the report of the Judge before whom this trial was had, who was ſatisfied that the verdict was not againſt evidence; ſo that nothing is offered for *a new trial*, but only that the long continuance in the poſſeſſion of this mayoralty ſuppoſes, that the defendant had a right to be mayor, and the inconveniency, if he was not mayor, would be to avoid all the corporate acts done by him as mayor for many years laſt paſt. It is true, if the queſtion had been at the trial, whether the defendant had a right to vote, or not, or whether he had taken the oaths or received the ſacrament within the time limited by the ſtatute, in ſuch caſe his being mayor *de facto*, and a long acquieſcence under ſuch a mayoralty, would be a ſtrong evidence for him; but when the queſtion only was, whether he was duly elected into that office, that is a queſtion concerning *the right*, and in ſuch caſe the long poſſeſſion of the mayoralty, or the many inconveniencies that would follow if he was not duly elected, ought not to be regarded. So that this verdict being given on good evidence, and ſo certified by the Judge who tried the cauſe, ſhall not be ſet aſide for any of the reaſons before-mentioned.

And thereupon * the rule was diſcharged, againſt the opinion of FORTESCUE, *Juſtice*, who was for the poſſeſſion.

* [135]

The King *againſt* Harriſon. Caſe 90.

Information in nature of a *quo warranto* againſt a ſteward of a leet for impanelling a jury not duly ſummoned.

AN INFORMATION in nature of a *quo warranto* was moved for againſt the ſteward of a court-leet, and againſt the bailiff and the conſtables, for impanelling a jury not duly ſummoned, the

bailiff

THE KING *againſt* HARRISON.

bailiff being the proper officer to ſummon them, who ſhould be all freeholders, for they only have a right to be jurymen; but there were none ſummoned, and ſix other perſons who had no right being preſent in court were ſworn of the jury, and ſix freeholders being likewiſe in court refuſed to be ſworn, becauſe they were not ſummoned; neither would they ſerve with thoſe who had no right to be of the jury, whereupon the ſteward ſwore ſix more; and the jury thus conſtituted by the ſteward of twelve perſons who had no right to be jurymen, choſe the bailiff and conſtables.

A rule was made for the defendant to ſhew cauſe why an information ſhould not go againſt him.

He ſhewed for cauſe, that the ſix freeholders who appeared in court were duly ſummoned, but that they refuſed to be ſworn of the jury; whereupon the ſteward ſwore a jury out of ſuch perſons who were preſent in court, which he inſiſted was a good election, which jury choſe the two conſtables and one bailiff of the manor, and that this was the conſtant courſe of chuſing ſuch officers; and that it would be dangerous to make a precedent of trying the right of chuſing ſuch men by a *quo warranto*.

THE COURT. Here is no room for any complaint againſt *the conſtables* or *the bailiff*; but if any, it is againſt *the ſteward*.

And therefore a rule was made for *the ſteward* to attend, and to ſhew cauſe why *an attachment* ſhould not go; and the rule for the reſt was in the mean time enlarged.

*[136]

Caſe 91.

The King *againſt* Athos, Father and Son.

An indictment for murder found at the grand ſeſſions in *Wales* may be removed by *certiorari* into the next *Engliſh* county to that in which the fact was commited; and therefore a murder committed in *Pembrokeſhire* may be tried in the county of *Hereford*; for by the ſtatutes 26. *Hen.* 8. c. 4. the 26. *Hen.* 8. c. 6. and 34. & 35. *Hen.* 8. c. 26. the juſtices of aſſize in the next *Engliſh* county have a *concurrent juriſdiction* throughout all *Wales* with the grand ſeſſion.—S. C. 1. Stra. 553. 3. Burr. 1330. 1. Com. Dig. "Action" (N.). 6. Com. Dig. "Wales" (B. 1.).

THIS CAUSE began in *Hilary Term*, in the ninth year of *George the Firſt* (*a*). THE ATTORNEY-GENERAL moved, in *Eaſter Term* laſt, for an *habeas corpora* directed to the gaoler of the common gaol in the county of (*b*) *Pembroke*, to remove *the bodies* of *Thomas* * *Atho* the father and *Thomas Atho* the ſon from the gaol in *Pembroke* to the keeper of the gaol in the county of *Hereford*, that being the next *Engliſh county* to *Pembroke*, and likewiſe for a *certiorari* to be directed to the proper officer to remove *the indictment* found againſt them in *Wales* (*c*), and to the coroner of

(*a*) The firſt motion was in Hil. 9. *Geo.* The reaſon given was, in order that they may receive their trial in the county of *Salop*, the next *Engliſh* county, according to the ſtatute of 26. *Hen.* 8. c. 6. ſ. 6. Lev. 118. Mod. Rep. 64. The county of *Pembroke* was formerly one of the ancient *Welſh* counties.—Cur. By virtue of that ſtatute we may grant ſuch *certiorari*; and we are alſo warranted by former precedents on Mr. Harcourt's ſearch; as Rex v. David Davies, 3. *Car.* 1.

(*b*) There was no rule in com. *Pembroke* in Eaſter Term, but only in com. *Hereford*.

(*c*) See Lev. 118. Mod. Rep. 147.

Pembrokeſhire

Pembrokeſhire to remove *the inquiſition* taken by him upon the view of the body of *George Martin*, who was murdered by the father and ſon in a barbarous manner, and for which an indictment was found againſt them in *Wales*.

THE KING *againſt* ATHOS, FATHER AND SON.

On motion to ſet aſide the former rule it was ſaid, that MR. ATTORNEY founded his motion upon the ſtatute 26. *Hen.* 8. c. 6. ſ. 6. by which it is enacted, "that Juſtices of peace and of gaol-"delivery in the counties next adjoining to *Wales*, where the "king's writ runneth, may hear and determine all felonies, and "their acceſſaries, committed in *Wales*, or the marchers thereof;" but this clauſe extends only to *lordſhips marchers*, and not to any of the *ancient counties* in *Wales*. Beſides, the aforeſaid ſtatute was altered about eight years after it was made; for by the ſtatute 34. & 35. *Hen.* 8. c. 26. by which *Wales* is divided into twelve counties, and Judges appointed to keep their ſeſſions in the ſaid counties, it was enacted, "That thoſe Judges might hold pleas of "the crown in as large a manner as the Judges in *Weſtminſter-*"*Hall*, and that they ſhall enquire, hear, and determine, all cri-"minal offences whatſoever committed within their ſeveral limits, "and adminiſter common juſtice to all the king's ſubjects there, "according to the laws of *England*." So that by this ſubſequent ſtatute the defendants ſhall not be put to their trial elſewhere, but only where the fact is ſuppoſed to be committed, which in this caſe was in *Pembrokeſhire*; if it ſhould be otherwiſe, then all criminal caſes which the Judges in *Wales* have power to hear and determine by the ſtatute laſt-mentioned would be removed to *England*, where he who is pooreſt, either the proſecutor or the criminal, muſt ſuffer, for want of money to bring and ſupport his witneſſes in an *Engliſh* county. It might be for this reaſon that a criminal indicted in *Wales* ought to be tried there.

THE COURT took time to conſider theſe ſtatutes, and declared, that if it was in their power they would grant the motion made by MR. ATTORNEY, becauſe it was very difficult to have juſtice done in *Wales* by a jury of *Welſhmen*, for they are all related to one another, and therefore would rather * acquit a criminal than have the ſcandal that one of their name or relations ſhould be hanged; and that to try a man in *Wales* for murder was like trying a man in *Scotland* for high treaſon, thoſe being crimes not much regarded in thoſe reſpective places.

* [137]

THE COURT, at another day, declared, that it would be better only to grant the *habeas corpora* without the *certiorari*; for if both ſhould be granted it would delay the proſecution, becauſe if the *indictment* and *inquiſition* ſhould be removed, they come both into court the next Term, and not before; and they muſt both be ſent down by *mittimus* to the next aſſizes in *Hereford*, which would not be until *March* following; ſo that the defendants could not be tried before that aſſizes.

THE KING *againſt* ATHOS, FATHER AND SON.

But THE COURT ſaid, that if THE ATTORNEY-GENERAL would enter a *nolle proſequi* as to the indictment already found in *Pembrokeſhire*, then the defendants might be indicted again for the ſame fact in *Herefordſhire*, and tried at the ſummer aſſizes, which would be the beſt and the moſt ſpeedy method.

Thereupon a *nolle proſequi* was entered, and a *(a) habeas corpora* granted, and the defendants were indicted and tried in the county of *Hereford*, and both found guilty of murder.

But becauſe their Counſel inſiſted, that this was a *miſ-trial*, the Judge who tried the defendants would not give ſentence to execute them.

THE ATTORNEY-GENERAL thereupon moved, in the beginning of *Eaſter Term*, in the ninth year of *George the Firſt*, for a *habeas corpora* to bring up their bodies to the Court, that they might receive ſentence of death, and for a *certiorari* to remove the record, ſo that the Court might have all before them to give judgment.

All which was granted.

And accordingly about a fortnight afterwards both the father and the ſon were brought to THE BAR.

THEIR COUNSEL objected, that their trial in an *Engliſh county*, and by a jury of *Engliſhmen*, was *a miſ-trial*; for if it were good, it muſt be by virtue of the ſtatute 26. *Hen.* 8. c. 6. as aforeſaid; but it could not be good by that ſtatute, becauſe it extended only to thoſe counties which were *lordſhips marchers*, and not to any of the *antient counties* in *Wales*, of which *Pembrokeſhire* was one, and there were ſeven more, (*viz.*) *Glamorgan*, *Caermarthen*, *Cardigan*, *Flint*, *Caernarvon*, *Angleſea*, and *Merioneth*. It is true, by that ſtatute it is enacted, "That the Juſtices of gaol-delivery in the "counties next adjoining to *Wales*, where the king's writ runneth, "ſhall hear and determine felonies, and their acceſſaries, commit-"ted in *Wales*, or the marchers thereof; and that an acquittal of
* [138] "felony in any * lordſhip marcher ſhall not be a bar for any perſon "indicted for the ſame within two years next after ſuch offence "committed;" ſo that it ſeems plain that this ſtatute relates only to the *lordſhips marchers*, who claimed ſeveral privileges, as to acquit criminals upon payment of fines, &c. which was never claimed in any of the old counties.

THE ATTORNEY-GENERAL, *on the other ſide*, inſiſted, that all *Wales* was comprehended by that ſtatute 26. *Hen.* 8. c. 6. and it is ſo explained to be by the ſubſequent ſtatute 34. & 35. *Hen.* 8. c. 26. by which *Wales* was divided into twelve counties, whereof eight were declared to be the ancient counties as before-mentioned, and four others were made by the ſtatute 27. *Hen.* 8. c. 26. VIZ. *Radnor*, *Brecknock*, *Montgomery*, and *Denbigh*.

(*a*) *Quære*, Whether this *hab. corp.* removed them immediately from *Pem-broke* gaol to *Hereford* gaol, or whether they were firſt brought up hither.

But at the desire of the prisoners, they had Counsel assigned to argue that point.

Afterwards one of the said Counsel moved for *a copy* of the writ of *habeas corpora* by which the prisoners were removed from *Pembroke* to *Hereford*, and likewise for a copy of the *certiorari* by which the record was removed, if any such there was; and if not, then for a copy of the order by which they were brought to *Hereford*, be it what it would, so that they might have the whole proceedings before them.

But this motion was not granted.

But the prisoners had a copy of their record.

THE CASE being appointed to be argued this Term,

KETTLEBY, *Counsel for the prisoners*, insisted, that their trial in *Hereford* for murder committed in *Pembrokeshire*, was against a fundamental principle of the common law, which appoints that all trials shall be *per pares*; and that by neighbours, upon a presumption that *vicinis acta vicini cognoscuntur*; so that this must be *a mis-trial* at common law. This is a cause of very great consequence to the principality of *Wales*, because if a fact committed there might be tried in an *English county*, then the richest man will always bring his cause to be tried there; and as it has been already observed, the poor man must suffer for want of money to carry all his evidence thither, either for his defence, or to prosecute another; and no persons are so well able to judge of the truth of what is sworn, as the neighbours of a witness to whom he is known, so that by this means a powerful and a rich man may procure such evidence as to have credit where they are not known, when the same persons might have no manner of credit by them who are their neighbours. * It must be admitted, that such a trial could not be at common law, neither is it allowed by that statute 26. *Hen.* 8. c. 6. as they would insinuate on the other side; and this may appear upon the reason of making that statute, which was as follows: In former ages, when the *Britons* were drove out of *England*, and retired amongst the mountains in *Wales*, they would frequently make inroads in a hostile manner into *England*, their native country; to prevent which, the kings of *England* gave large tracts of lands to some of their most powerful subjects on the borders, and these were called *lordships marchers*; and such lands which the kings kept on those frontiers, or which reverted to the crown by forfeitures, or otherwise, were called the king's *lordships marchers*. But afterwards these *lords marchers* pretending to some extravagant privileges, without any manner of right, therefore this statute was made to curb them, and it was calculated for that very purpose. This plainly appears by another statute made the very next year, the 27. *Hen.* 8. c. 26. by which *Wales* was incorporated, united and annexed to *England*, and "that "all persons born in *Wales* should enjoy the same liberties as the

* [139]

6. Com Dig. "Wales" (A.).

THE KING against ATHOS, FATHER AND SON.

"*Engliſh*," and that "the laws and ſtatutes of this realm, and "none other, ſhould be had, uſed, and executed in *Wales*," and divers *lordſhips marchers* were by this laſt ſtatute united to *Engliſh counties*, and others to *Welſh counties*, and the reſidue were divided into new and particular counties by themſelves, and thoſe were *Brecknock*, *Radnor*, *Montgomery*, and *Denbigh*; ſo that the eight old *Welſh* counties are not within that act, but only thoſe four counties which were cut out of the *lordſhips marchers*. It is true, there have been ſeveral attempts made to bring trials from thoſe old counties to the next *Engliſh counties*, but ſuch attempts never yet prevailed; yet ſo far they have gone as to obtain *certioraris* to remove indictments taken in this very county of *Pembroke*, becauſe thoſe are declarations for the king, which he may remove where he pleaſes. Beſides, the court of king's bench has been formerly of opinion, that they had power to remove indictments out of thoſe counties, to ſee whether they were good, and that they might quaſh them if they were not; but that if they were good, then to remand them back by *mittimus* into the proper counties by virtue of thoſe very ſtatutes. But * the Judges were not reſolved, that indictments thus removed could be tried in the next *Engliſh county*; yet after ſeveral arguments at bar, in the thirty-firſt year of *Queen Elizabeth*, whether *a certiorari* would lie to remove an indictment out of *Caernarvon*, or not, the Court would not determine it, and therefore that indictment was tried in the proper county. And wherever an indictment was removed, there is a *quære* how the Court muſt proceed upon it. In *Cheddle's Caſe* (*a*), which happened in the ninth year of *Charles the Firſt*, which was an indictment for murder found in *Angleſea*, and a *certiorari* granted to remove it, the Court declared that they were not yet reſolved, that it could be tried in an *Engliſh county* (*b*); and VAUGHAN, *Chief Juſtice*, who was a native of *Wales*, and may for that reaſon be preſumed to have ſtudied the law relating to that country, was of opinion, that this ſtatute 26. *Hen.* 8. c. 6. related only to the four counties taken out of *lordſhips marchers* (*c*). The words of that ſtatute upon which this queſtion ariſes are, "that "the offence ſhall be tried in the next *Engliſh county* adjoining "to the lordſhips marchers, or other part of *Wales* where it "was committed." Now it is to be conſidered, that *Wales* was originally *a kingdom* of itſelf, afterwards *a principality*, and ſubjected to *England* by king *Edward the Firſt*, in the year 1282; and afterwards by the ſtatute of *Rutland*, it was provided in what manner civil and criminal cauſes ſhould be tried there; and there is a clauſe in the ſtatute 27. *Hen.* 8. c. 26. by which *Wales* was incorporated to *England*, "that the ſaid ſtatute ſhould not extend "to derogate from any other act before that time made for the "trial of murder or felony committed in any *lordſhip marcher*, or "in any county of *England* next adjacent thereunto," which is

* [140]

(*a*) 1. Roll. Abr. 394. Cro. Car. 331.
(*b*) See Rex v. Thomas, 2. Lev. 128.
(*c*) Vaugh. 413.

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an evident proof that the ſtatute 26. *Hen.* 8. c. 6. did not include all *Wales*. As to the clauſe, "that ſuch offences ſhall be tried "in the next *Engliſh county* adjoining to the lordſhips marchers, "or other part of *Wales* where they were committed," there the word "ſuch" is a relative; and it is in the enacting part of the ſtatute, and therefore muſt refer to ſome antecedent, which muſt be to ſome crime mentioned in the preamble, and the words "other part of *Wales* where the offences were committed," muſt be intended other parts which were neither within the *lordſhips marchers*, or within the *old counties*. * It is the opinion of *Lord Coke* (*a*), that all ſtatutes ought to be interpreted ſo as the innocent may not ſuffer; and that to conſtrue an act by itſelf, is the beſt ſort of conſtruction, becauſe it is *ex viſceribus cauſæ*; but if this act ſhould be conſtrued as the proſecutors would have it, then it would take away all juriſdiction from *Wales*, and make the ſtatute itſelf of no effect, for it would be abſurd and inconſiſtent to exclude all *Wales* from a juriſdiction of trying offences by removing the indictments into *Engliſh counties*, when this very ſtatute expreſsly gives a juriſdiction to part; for it provides, "that all felonies, and their acceſſaries, committed in the county "of *Merioneth*, ſhall be enquired, heard and determined in the "counties of *Caernarvon* or *Angleſea*, before the Juſtice of *North* "*Wales*, or his deputy, and by an inqueſt of *Caernarvon* or *An*-"*gleſea*." Beſides, by the aforeſaid ſtatute 27. *Hen.* 8. c. 26, of incorporating *Wales* with *England*, it is enacted, "that all "perſons born there ſhall enjoy all liberties as other ſubjects of "*England* do enjoy;" and it is certainly a very valuable liberty and privilege for a man to be tried by his equals and neighbours, which privilege has been enjoyed by the *Welſh* ever ſince the making that ſtatute, which is now above a hundred years; and during all that time there is no inſtance to be given of removing any trial from either of the old *Welſh counties* to be tried in an adjoining *Engliſh county*; and it would be very hard to make a precedent for that purpoſe after ſuch a length of time,

THE KING *againſt* ATHOE, FATHER AND SON.

* [141]

SECONDLY, It was objected againſt the record, *viz.* to the indictment on which the priſoners were tried, that the caption thereof was, that the grand jury (naming them) were *jurati et onerati ad inquirendum pro corpore comitatûs Herefordiæ*, which muſt be of ſomething ariſing within that county; but here the fact did not ariſe in that county, but in *Wales*.

THE COURT. This is the conſtant form in indictments for foreign treaſons or felonies, and there is no difference, though in the laſt caſe the offence in the indictment is laid to be committed in that county where the enquiry is; for the ſtatute of 26. *Hen.* 8, c. 6. ſ. 6. has declared that theſe offences "ſhall be enquired of "in the ſame manner and form as if the ſame had been committed "within the ſaid ſhire."

(*a*) Co. Lit. 11. Hob. 330.

THE KING *againſt* ATHOS, FATHER AND SON.

IT WAS ARGUED *on the other ſide*, that though it was the fundamental rule of the common law, that trials ſhould be had *per pares, et de vicineto*, yet that rule will be of no weight when the manner of trials is altered by act of parliament, as it was in this caſe, and that upon due conſideration and for the advancement of juſtice. Now as to the ſtatute upon which the preſent queſtion
*[142] ariſes, it is as full as words can expreſs it, "that * the trial of a "fact committed in *Wales* may be in the next *Engliſh county*;" for by the plain and poſitive words of the act, all *Wales* is included. It is true, the *lordſhips marchers* are often repeated in the ſtatute 26. *Hen.* 8. c. 6. and from thence it is inferred, that it was made to redreſs ſuch abuſes which were committed there. But it is plain that this is a remedial law, and made to redreſs all abuſes, as well in every county in *Wales* as within the *lordſhips marchers*; and there are clauſes in it which meet with every abuſe, as well within the one as the other. It is true, the *lords marchers* did pretend to have ſeveral privileges and immunities which were never claimed by the reſt of the people in *Wales*, and therefore this ſtatute (which was made for the remedy thereof) was penned with particular clauſes to meet with thoſe miſchiefs; as where they pretended to a privilege that none of the king's miniſters ſhould enter into their territories; and a privilege to pardon murders, and to acquit perſons who had committed capital offences upon paying fines (*a*), and that ſuch acquittal ſhould be a bar to any ſubſequent trial for the ſame fact; and therefore it was provided by this ſtatute, "that no acquittal in the *lordſhips marchers* ſhould be a bar to a trial "in an *Engliſh county*, if it was proſecuted within two years after "ſuch acquittal," which clauſe, though it is general in the ſtatute, muſt be intended an acquittal by paying a fine only (*b*); for this, being a remedial law, was calculated to meet with all the grievances in *Wales*. The ſtatute 27. *Hen.* 8. c. 5. which was made the very next year, complains of want of juſtice in *Wales*, which is a proof that the ſtatute 26. *Hen.* 8. c. 6. intended likewiſe all *Wales*, for *indefinitum æquipollet univerſale*; therefore this act intended all the *old counties* as well as the *lordſhips marchers*. And further, the ſtatute 34. & 35. *Hen.* 8. c. 36. recites "all *Wales*;" and in the ſaid recital there are theſe words, "though the ſtatute "26. *Hen.* 8. c. 6. was never put in execution in the counties "of *Angleſea*, *Merioneth*, or *Caernarvon*, it ſhall be uſed as law
*[143] "in them as well as in *South Wales*, &c." * Now *Pembrokeſhire* is part of *South Wales*. It is true, no caſe comes up to the point now in queſtion; but yet, for the reaſons before mentioned, a trial in an *Engliſh county* for a fact committed in *Wales* is good. In that caſe of *The King v. Thomas* (*c*), the defendant pleaded *auter fois acquit* when he ſhould have demurred to the juriſdiction; and the extrajudicial opinion of VAUGHAN, *Chief Juſtice*, in that

(*a*) See the caſe of Rex v. Thomas, 1. Sid. 179. 1. Lev. 118.

(*b*) So by the ſtatute 34. & 35. *Hen.* 8. c. 36.

(*c*) 1. Lev. 118.

caſe,

caſe, is the only opinion againſt a trial in an *Engliſh county*, but it does not appear what induced him to be of that opinion. This ſtatute 26. *Hen.* 8. c. 6. appears plainly to be made to enlarge the king's juriſdiction, which was wanting in *Wales*, and for the advancement of juſtice; and therefore it ought to be conſtrued ſo that all the clauſes therein may ſtand together, and not that one ſhould make the other void, but ſhould be expounded by each other, for ſuch a conſtruction is *ex viſceribus cauſæ*, as well as a conſtruction of the enacting part by the preamble. Now in the enacting part of this ſtatute, it is ſaid, "that juſtices of gaol-delivery "in the counties next adjoining to the *lordſhips marchers*, or other "part of *Wales*, may hear and determine all felonies and their "acceſſaries committed in *Wales*, or the marchers thereof," which words "other part of *Wales*" can never be intended (as inſiſted on the other ſide) other part thereof which was neither within the *lordſhips marchers* or the *old counties*, becauſe there is no part of *Wales* but what is within one of them. And ſuch counties there were ever ſince *Wales* was united to *England*, as appears by the ſtatute 12. *Edw.* 1. c. . called *ſtatuta Walliæ*, where there are many good laws concerning the diviſion of it into counties; and ſheriffs were there, which ſhews that it muſt be then apportioned into counties. It was the expreſs judgment of the parliament 34. & 35. *Hen.* 8. c. 11. that offences done in thoſe old counties might be tried in the next adjoining *Engliſh* county, by virtue of the ſtatute 26. *Hen.* 8. c. 6. aforeſaid; for by that firſt ſtatute it is appointed, "that offenders in *Merioneth* may be tried in *Salop*," and ſo might thoſe of *Angleſea* or *Caernarvon*, though the act 26. *Hen.* 8. c. 6. was never yet put in execution there; yet by the aforeſaid ſtatute it was declared to be in force there, as well as in *South Wales*, which are general words. So that by the ſaid ſtatute 26. *Hen.* 8. c. 6. it was thought neceſſary to curb the inſolence of the *lords marchers*, and to prevent an acquittal by paying a fine to be a bar to a proſecution * of a criminal in an *Engliſh county* for a fact committed in *Wales*, ſo as ſuch proſecution was commenced within two years after the acquittal. VAUGHAN, *Chief Juſtice*, admits, that *an exigent* and a *capias utlagatum* went into the ancient *Welſh* counties ever ſince the reign of *Edward the Firſt*, though not into the *lordſhips marchers*; and the reaſon was, becauſe they had no ſheriffs in the ſaid *marchers*; and as to the inconveniency of removing cauſes into *Engliſh counties*, there is none, as pretended on the other ſide, becauſe the proſecutor is never allowed to remove the cauſe without good cauſe ſhewed; but the king may remove his cauſe at pleaſure.

* [144]

PRATT, *Chief Juſtice*, ſaid, it ſeemed one of the cleareſt caſes that ever was. And *(inter alia)* as to the caſe quoted from *Roll. Abr.* 394, 395. and *Cro. Car.* 331. the queſtion there was only, Whether a *certiorari* would lie? We have granted one: and I think we are well enabled ſo to do; for *certioraris* will lie into *Wales*.

THE KING *againſt* ATKOS, FATHER AND SON.

THE COURT. All that can be ſaid for the priſoners has been fully urged by their Counſel, but the Court is bound by expreſs and plain words in this act of parliament, the preamble whereof complains of "great offences in *Wales*," which are general words, and comprehend all *Wales*; and in the enacting part it is declared, that the miſchiefs were "all over *Wales*, but greater in the *lord-* "*ſhips marchers*;" ſo that it is plain the parliament intended to give ſome remedy to the whole, that it might be adequate to the miſchief, and meet it in as large a manner as poſſible. Now thoſe general words in the enacting part, ſhall never be reſtrained by any words introducing that part; for it is no rule in the expoſition of ſtatutes to confine the general words of the enacting part to any particular words either introducing it, or to any ſuch words even in the preamble itſelf. It is true, *Lord Coke* (*a*) commends a conſtruction which agrees with the preamble, but not ſuch as may confine the enacting part to it. And of the ſame opinion was HOLT, *Chief Juſtice*, in *Chambers's Caſe* (*b*), who was tried here for a murder committed in *Barcelona* in *Spain*, who ſaid that trial was good by virtue of the ſtatute 33. *Hen.* 8. c. 23. though the caſe was not within the miſchief recited by that act.

Cro. Car. 498. 533. W. J. Rep. 320. See Atk. Rep. 175. 182.

EYRE, *Juſtice*. The ſame reſolution was given about two years ago in the caſe of *Rex v. Elym* at the OLD BAILEY (*c*).

FORTESCUE, *Juſtice*. The like conſtruction was made of the act of 13. & 14. *Car.* 2. c. 12. ſ 21. *Rex v. Inhabitants of Rufford* (*d*). He ſaid, that he was perſuaded this juriſdiction would be ſparingly executed, and never unleſs the juſtice of the cauſe required it; therefore it will not be a conſequence, that no felon will be ever tried in the proper county in *Wales*. So that upon the whole it muſt be admitted, that a preamble may be a good expoſitor of a ſtatute; but what was offered on the other ſide is not properly a preamble, but only introductive to an enacting part of the ſtatute: beſides, there was a time when there were no preambles to acts of parliament, and yet they were good; and even at this time preambles are no more than recitals of inconveniencies, which do not exclude any other to which a remedy is given by the enacting part. * It is true, there is an extrajudicial opinion of LORD VAUGHAN againſt ſuch trials in an *Engliſh county*; but he being a native of *Wales*, might be prejudiced in favour of his country, and his notes were never reviſed or deſigned by him to be printed. As to the objection, that part of *Wales* is entruſted with trials of facts ariſing there, as that an offence in *Merioneth* ſhall be tried in *Angleſea*; and therefore it would be inconſiſtent to ſay, that the juriſdiction ſhould be taken from the whole when it is expreſsly given to part; the anſwer is, that no juriſdiction is taken from *Wales*, becauſe this ſtatute gives the king only a concurrent juriſdiction to have the criminal tried in the next *Engliſh county* at

* [145]

(*a*) W. Jones, 164. Palm. 485.
(*b*)
(*c*)
(*d*) Ante, 39.

his

his election: and the reaſon is plain, for the *Welſhmen* had uſurped privileges to which they had no manner of right; therefore theſe ſtatutes ſhew that they deſerved correction; and in the enacting part "all *Wales*" is included as well as "the *lordſhips marchers*:" ſo likewiſe where it is ſaid, "that if jurors in *Wales*" (which words include the whole) "did not act according to evidence, they ſhould be puniſhed by the preſident and judges by "fine, &c.;" which is ſuch a ſevere check upon juries, that it would never have been enacted without ſome piece of injuſtice or partiality notoriouſly known and repreſented to the parliament in thoſe days. It is admitted that there is no precedent in point for ſuch trials in an *Engliſh county*; but the reaſon may be, becauſe that ſtatute 34. & 35. *Hen.* 8. c. 11. tells us, that "the laws were "not put in execution."

THE KING *againſt* ATHOS, FATHER AND SON.

And for theſe reaſons, by the opinion of THE WHOLE COURT, it was adjudged that this was a good trial,

THE COURT thereupon ordered, that the priſoners ſhould be brought up on another day to receive ſentence; and accordingly they being brought to the bar,

IT WAS MOVED *in arreſt of judgment*, that the Court could not proceed to give ſentence, but that they ought to be remanded into *Herefordſhire*, to receive judgment at the aſſizes, becauſe by this ſtatute that power is given to the Judge of aſſize who tried the cauſe, and to him only.

But upon reading the ſtatute, the words were, "that the priſoner "ſhould be tried and condemned, as if the fact had been "committed in the next *Engliſh county*;" and certainly this Court might paſs ſentence on a criminal convicted in an *Engliſh county*. See 5. Burr. 2797.

So that motion was over-ruled.

And thereupon ſentence was given, and a rule of court was made to THE MARSHAL of the king's bench to execute the priſoners on * *Friday* the fifth day of *July*, who accordingly did execute them at the common (*a*) gallows in the county of *Surrey* (*b*). * [146] See Vent. 93.

(*a*) *Quere*, If it was not at St. Thomas's à Waterings. See Stra. 553.

(*b*) This rule was made "die Sabbati, "prox. poſt octab. Trin. 9. *Geo.*" (which was the ſecond Saturday in that Term).

The King *againſt* Burnaby. Caſe 92.

UPON A MOTION for a *certiorari* to remove an indictment for *a murder* committed in *Angleſea*, upon an affidavit that the proſecutor feared ſome partiality in *Wales*, and therefore that it

The Court will not grant *a certiorari* to remove an indictment of *murder* from *Wales*, on the proſecutor's affidavit, that he was informed by his ſolicitor that the defendant had made preſents to the gentlemen of the county; but on full and clear evidence of probable partiality the trial ſhall be had in the next *Engliſh county*.—Ante, 135. Stra. 553. 1. Roll. Abr. 394. Cro. Jac. 484. Cro. Car. 248. Stra. 704. 1. Hale, 157. Ld. Ray. 581. 2. Burr. 835. 4 Burr. 2457. Cowp. 751. *mitis*. Dougl. 751. 2. Hawk. P. C. ch. 27. ſ. 25.

might

THE KING *againſt* BURNABY.

might be tried in the next *Engliſh county*, for the defendant was bailed, and had made ſome valuable preſents to the gentlemen of that county, as the proſecutor was informed by his ſolicitor;

A RULE was thereupon made for the defendant to ſhew cauſe why *a certiorari* ſhould not go.

At another day it was ſhewed for cauſe, that if trials ſhould be removed out of *Wales* into the next *Engliſh counties* upon ſuch uncertain allegations, there could never be any trials there. And firſt, as to ſaying he was bailed, that could be no reaſon for the proſecutor to fear any partiality; for the defendant was bailable by law, becauſe by the coroner's inqueſt, the fact was only found *chance-medley*: and as to the preſents made to the gentlemen of the county, the affidavit was only, that he was told ſo by his ſolicitor, who probably might tell him what was falſe; therefore he ought to make a poſitive oath of that matter, otherwiſe a *certiorari* ſhall not be granted. Beſides, in this caſe both the priſoner and the deceaſed were natives of *Holland*, and had no manner of intereſt in *Wales*; ſo that there is no colour to fear any partiality, but that juſtice will be equally diſtributed.

THE COURT: Where there is a juſt reaſon to induce the Court to believe that partiality will be ſhewed on either ſide, there the indictment ſhall be removed into an *Engliſh county*: but the truth of that matter will be ſuſpected, where it is upon the motion of either the priſoner or proſecutor, and in ſuch caſe there muſt be a full and clear affidavit to induce the Court to grant *a certiorari*; but where it is at the inſtance of THE ATTORNEY-GENERAL in behalf of the crown, it ſhall be granted without an affidavit; therefore this rule ſhall be ſet aſide for want of a ſufficient affidavit, but the proſecutor ſhall have leave to move it again upon a better.

*[147]

* Belt *againſt* Collins.

Caſe 93.

Writ of error *coram vobis reſiden.* is a good *ſuperſedeas* after it is allowed.

A WRIT OF ERROR *coram vobis reſiden.* was brought on a judgment given in the court of king's bench.

The queſtion was, Whether it was *a ſuperſedeas* before it was allowed by the Court?

IT WAS ARGUED that it was not, becauſe this writ is different from other writs of error, for it is only that the Judges ſhall review their own judgment; and being ſued out of Term, it is no *ſuperſedeas* without allowance by the Court in Term-time. Neither is any other writ of error *a ſuperſedeas* before it is allowed, becauſe it is taken out of one court to reverſe the judgment of another; and he who takes it out may keep it in his pocket without giving notice; for which reaſon it would be very inconvenient if ſuch a writ of error ſhould be *a ſuperſedeas*.

IT WAS SAID *on the other ſide*, that this is as good *a ſuperſedeas* as if the writ of error had been ſued out in Term-time, for the law has

has not fixed any certain or determinate time for ſuing out writs of error to reverſe the judgments of this court in the exchequer-chamber; but ſuch writs are always allowed by the ſecondary, as well out of Term as within; and a motion was never yet made in this court to allow a writ of error.

BELT *againſt* COLLINS.

THE CHIEF JUSTICE and TWO OTHER JUDGES were of opinion, that it would be hard that the execution of a judgment in this court ſhould be delayed by a writ of error allowed by a ſecondary; for if that ſhould be ſo, then any man may avoid the execution for a whole Vacation, at the expence of no more than one ſhilling (*a*). There is certainly ſome variance between a writ of error of a judgment *coram nobis reſiden.* and other writs of error; for the one is directed to the Juſtices of this court, and therefore ſhould be allowed by the Court, but the other is directed to the Chief Juſtice only.

EYRE, *Juſtice*, was of another opinion. He cited the caſe of *Lowns v. Carter*, in *Chief Juſtice* HOLT'S time (*b*), where a writ of error was adjudged a *ſuperſedeas* before it was allowed. It is true, there is a difference between this caſe and other writs of error; but the reaſon is plain; for where writs of * error are brought in THE EXCHEQUER-CHAMBER, or in THE HOUSE OF PEERS, to reverſe the judgments of this court, they are always directed to the Chief Juſtice alone, becauſe he is to certify the record; but where a writ of error *coram vobis reſiden.* is brought, there is no record certified. Beſides, there never yet was a motion in a court of law to allow a writ of error, becauſe it is a writ of right, and due to the ſubject *ex debito juſtitiæ*. But admitting this writ is no *ſuperſedeas* before the allowance, yet it is a good *ſuperſedeas* after it is allowed, as this was, by THE SECONDARY, and before notice; and ſo it was adjudged in the caſe of *Smith v. Cave* (*c*), in which caſe an execution executed was ſet aſide; but the want of notice excuſed the contempt.

* [148]

(*a*) Therefore, although the allowance of a writ of error is of itſelf a *ſuperſedeas*, and the ſervice of the allowance only to bring the party into contempt if he proceeds, Jaques *v.* Nixon, 1. Term Rep. 279.; Perry *v.* Campbell, 3. Term Rep. 390.; yet the Court will not ſet aſide a defendant's execution for the coſts of a nonſuit ſued out after the allowance of a writ of error, becauſe the writ of error can only be for delay, Kempland *v.* Maccaulay, 4. Term Rep. 436.; nor will the Court ſet aſide an execution for coſts on a judgment in nonſuit in any caſe merely becauſe a writ of error was allowed, Box *v.* Bennet, 1. H. Bl. Rep. 432.; nor an execution on any judgment, if it appear that the writ of error was brought merely for delay, Mitchell *v.* Wheeler, 2. H. Bl. Rep. 30.

(*b*)

(*c*) 3. Lev. 312.; and ſee Dawbigne *v.* Davy, Dyer, 244.; Eyres *v.* Lenthal, 1. Mod. 112.; and Poph. 132. Vent. 207.

The King *againſt* The Univerſity of Cambridge.

Caſe 94.

MANDAMUS to the vice-chancellor, maſters, and ſcholars of *Cambridge*, to reſtore *Dr. Bentley* to the degrees to which he had been admitted by THE UNIVERSITY, and had been ſurreptitiouſly

Time allowed to ſhew cauſe to a *mandamus*.

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tiouſly degraded (as was ſuggeſted), or that they ſhould ſhew cauſe why he ſhould not be reſtored.

THE COUNSEL *for the Univerſity* deſired time to ſhew cauſe why *a mandamus* ſhould not go, for that there were ſeveral old books and charters which were neceſſary to be inſpected before they could ſhew cauſe.

And thereupon the time was enlarged for that purpoſe.

And upon another day

A *mandamus* lies to reſtore a member of a univerſity to *Doctor's degrees*, from which he had been degraded by the Univerſity court for ſpeaking contemptuous words of the *vice-chancellor*, and of the proceſs of the court.

IT WAS ARGUED *for the Univerſity*, that by virtue of a charter given to them by *Queen Elizabeth*, they had a court of judicature to try and determine all matters ariſing within their juriſdiction, in which court a plaint was levied by *Dr. Middleton* againſt *Dr. Bentley*, and thereupon a ſummons was ſent by the beadle to *the Doctor*, which he received, and ſpoke *contemptuous words* of the court, for which he was degraded, and from which no appeal would lie, no more than a writ of error would lie for impoſing a fine by a temporal court for a contempt, becauſe every court of record is entruſted with the final judgment of what ſhall be a contempt to their authority; therefore if an appeal or a writ of error would lie in ſuch caſe, it would put the trial of what is a contempt * to the diſcretion and judgment of a ſuperior court, and ſo ſtrip an inferior court of that power which they have by law to judge what is a contempt to them; whereas contempts of the authority of courts are undoubtedly to be judged by the ſame courts to whom the contempt is offered; which is the reaſon that a writ of error will not lie on a ſentence for a contempt to this court; but then it muſt be plainly proved. Now the ſame thing is done by a *mandamus* after an indirect manner as would have been done by an appeal or writ of error, if that would lie; but as *an appeal* will not lie for a contempt, ſo neither will a *mandamus*; for admitting this degradation had been *ad libitum*, yet a temporal court could not grant *a mandamus*. It is like the caſe of a recorder of a corporation who was removeable at will, and being diſplaced moved for a *mandamus*, but it was denied. Beſides, the conſtant courſe and cuſtom of this Univerſity warrants a diſcretionary power amongſt them to confer degrees on ſome, and to degrade others for any contempt; and in this caſe they have done all they could to bring *Dr. Bentley* to an eaſy agreement; for after the firſt ſummons they ſent another in writing by their beadle, but *the Doctor's* doors were then ſhut, and he would not be ſeen; then they adjourned from day to day, on purpoſe to give him leave to appear, before they would ſuſpend him; but when he contemptuouſly declined, they firſt ſuſpended and afterwards degraded him. Now as a *mandamus* was never yet granted to admit a man to a degree in THE UNIVERSITY, after he had performed all his exerciſes, ſo there ought to be none to reſtore one after a degradation, becauſe degrees are arbitrarily given by the univerſities, and ſo are degradations arbitrarily made; for if they ſhould by any means raſhly

* [149]

S. C. 2. Ld. Ray. 1334. S. C. Stra. 557. S. C. Fort. 202. And 177. 3. Bac. Abr. 532. 2. Ld. Ray. 1564. Eſp. Dig. 677. 2. Term Rep. 358.

rashly admit an unlearned man to a degree, they may upon better information degrade him, without taking a traverse to the return of a *mandamus*, which must be tried by a jury of lay freeholders. Besides, these degrees are but titles of honour and precedency, and give no temporal right, and for that reason a *mandamus* ought not to go; for if *a knight* should be degraded in A COURT OF HONOUR, no *mandamus* would lie to restore him *(a)*, which is a case in point; therefore if it should lie in this case, it would introduce a new method to evade * the privileges given by this charter, which was afterwards confirmed by parliament; and as it hath been formerly adjudged in the case of *Castle v. Litchfield* (*b*), that a *certiorari* or writ of error will not lie to correct a judgment given for a contempt, so no *mandamus* ought to go, which is in effect the same. If it should be objected, that his degree qualifies him for some temporal employment, of which he would be incapable without it; now admitting that to be true, yet such employments are only consequential, and not directly incident to his degree, and therefore ought not to be regarded. And if another objection should be made, *viz.* that *the Doctor* would have appeared by a proctor, but was not allowed so to do; though this may be true, yet it is no objection of weight, because it might not be the course of their court to admit such appearances, and THE UNIVERSITIES have a privilege to proceed according to their own laws, as an encouragement to learning; and if they have proceeded accordingly, this Court will not interpose. Now take the case as it stands upon *Dr. Bentley's* affidavit, there will be no reason to grant a *mandamus*; for he makes oath, that he has appealed from the sentence of the University court; which if true, then there is another remedy for him to be restored, *viz.* by an appeal; and where there is another remedy, a *mandamus* is never granted. Moreover *the Doctor* made oath, that the University had no power to degrade him; if so, then he is not degraded for want of a sufficient power so to do, and consequently a *mandamus* ought not to go, for it is impossible that a man should be restored to his degree who was never degraded.

* [150]

But ON THE OTHER SIDE *it was said*, that the merits of this cause ought not to be argued upon a motion, but upon the return of the *mandamus*; and for that reason it ought to be granted.

THE COURT. All care shall be taken that justice shall be duly administered in THE UNIVERSITIES; but if they assume an arbitrary power exempt from the jurisdiction of any other court of judicature, then they may do what they please without controul; and where people are under such a government, they are in a very bad condition. But this Court hath a greater regard to the learning of the Universities than to admit the arbitrary sentence of a vice-chancellor to be final. * As to what has been said, that the degrees in the Universities are only *honorary*; this is a mistake,

* [151]

(*a*) 1. Lev. 119. (*b*) Hardres, 505.

for

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for they are blended with a temporal right ſo far as to deſerve a *mandamus* to reſtore a man degraded. It is true, this might have been a proper objection before the ſtatutes of 21. *Hen.* 8. c. 13. and 13. & 14. *Car.* 2. c. 4. were made, which render a man incapable of a benefice if he had not taken his degrees in ſome univerſity; for before thoſe ſtatutes, ſuch degrees were only titles of precedency, and the allowing them, or a degradation, was no temporal advantage or loſs; therefore in ſuch caſe the temporal courts had no reaſon to interpoſe; and this may be the reaſon why the Univerſities degraded *ad libitum*, and of their conſtant courſe ſo to do. But this is no objection ſince the making thoſe ſtatutes. Neither ſhall it be ſaid, that where a corporation has admitted a man willingly to his freedom, that they ſhall have power to disfranchiſe him, becauſe they do not like him; neither can the Univerſities give degrees to whom they pleaſe, and take them away *ad libitum*. And though their Counſel have objected againſt this *mandamus*, for that they have an exempt and abſolute juriſdiction amongſt themſelves, this ſeems to be a good reaſon why it ſhould be granted, though it might have been otherwiſe if they had ſhewed that they had a viſitor, to whom an appeal would lie; for probably that might have excluded the ſuperintendency of this Court; but to deny a degree to him who had performed all his exerciſes to qualify him for a degree, would be a great diſcouragement to learning; and in ſuch caſe this Court would grant a *mandamus* to admit him, eſpecially ſince it is accompanied with a temporal intereſt. Now admitting it ſhould be enacted by ſome ſtatute, that a man ſhould be incapable of ſuch an office if he was not *a knight*, ſhould not *a knight* degraded have a *mandamus*? Certainly he ſhould; and ſo had *Dr. Bentley* in this caſe.

The return of the *mandamus*.

The *mandamus* was granted, and the Univerſity made this return:

* [152] * That THE UNIVERSITY has been an ancient univerſity *temporibus*, &c. and alſo a corporation by the name of "chancellor, "maſters, and ſcholars;" that they have had the care and education of the youth and ſcholars there; that they have had and uſed the right of conferring degrees on any perſons whom they pleaſed, and the ſame perſons *ab eiſdem gradibus (propter contumaciam vel aliquam aliam juſtam vel rationabilem cauſam) ſuſpendere vel deprivare*; that a court was granted by *Queen Elizabeth* to THE UNIVERSITY to be held before the vice-chancellor for the time being, or his deputy, and to have cognizance of all pleas, &c. except matters of freehold and felony; that the privileges of the Univerſity have been confirmed by act of parliament (*a*); that *Doctor Coniers Middleton* levied a plaint in the ſaid court againſt *Doctor Bentley*, in a plea of debt, for four pounds ſix ſhillings (they both reſiding within the ſame univerſity) *ſecundum conſuetudinem curiæ*, and prayed proceſs; *ſuper quo*, at his petition, the

(*a*) 13. *Eliz.* c. 28.

court

court awarded a proceſs *ad compellend. prædict.* RICARDUM BENTLEY *ad apparend. coram* the vice-chancellor or his deputy *ad prox. cur.*; *quod quidem decretum*, the twenty-third of *September* 1718, *fuit deliberat.* EDWARDO CLARKE, beadle of the court; that the ſaid *Edward Clarke acceſſit ad dictum* R. BENTLEY *et oſtendit dictum decretum*; *et ſuperinde* the ſaid twenty-third of *September* the ſaid *R. Bentley* having diſcourſe with the ſaid *Edward Clarke* concerning *Doctor Gooch*, being then vice-chancellor, ſaid, that the decree was unlawful and unſtatutable, *et quod noluit illud obedire*, that *Doctor Gooch non fuit ipſius judex, et ſtultè egit, et alia verba contumelioſa propalavit, et dictum decretum de manibus* ED. CLARKE *abſtulit*; that at the next court *Doctor Middleton* appeared and declared in debt for four pounds ſix ſhillings, *ſecund. conſuetud.* at which court the ſaid *Ed. Clarke quaſdam depoſitiones exhibuit* to the regiſter of the ſaid contempt and diſobedience of the ſaid *R. Bentley*; that thereupon the vice-chancellor, with conſent of ſeven doctors of the univerſity, who were heads of colleges, declared, that the ſaid *R. Bentley pro contemptu illo ſuſpenſus fuit ab omni gradu ſuſcepto titulo et jure*, and he was accordingly ſuſpended.—THE RETURN further ſhews, that there is a cuſtom within the univerſity to aſſemble the maſters of the colleges in the univerſity, which aſſembly is ſtiled A CONGREGATION, and have power (*ſuper contumaciam vel aliam juſtam et rationabilem cauſam*) to deprive any perſon of their degrees, *et ſuper purgationem reſtituere*; that accordingly a congregation was aſſembled ſeventeenth of *October*, when *Doctor Gooch narravit contemptum prædict. pro quo ſuſpenſ. et deprivat. fuit, et petit quod dejiciatur et excludatur, &c. Et ſuperinde viſis præmiſſis et lectis depoſitionibus prædict.* the ſaid congregation confirmed the decree of ſuſpenſion, and further ordered, that the ſaid *R. Bentley de omni gradu ſuſcepto et titulo et jure penitus dejicietur et excludetur. Et pro his cauſis, &c.*

IT WAS OBJECTED *againſt this return* in general, that admitting the vice-chancellor, maſters, and ſcholars, had a power of giving degrees, and of ſuſpending and degrading for reaſonable cauſes, yet that power muſt be under the inſpection of this Court, unleſs they can ſhew ſome good cauſe to exclude it. Now by this return they do not pretend that any appeal did lie to a proper viſitor, but have abſolutely excluded all viſitatorial inſpection; ſo that by their own ſhewing they are ſubject to the juriſdiction of this Court, as all other corporations are. Beſides, every man who is admitted to a degree in the univerſity has a freehold for life, of which ſeveral ſtatutes take notice; as, for inſtance, the ſtatute 21. *Hen.* 8. c. 13. enacts, "that the ſeveral perſons therein named, and who "are admitted to degrees in either of our univerſities, and not by "grace only, may purchaſe a diſpenſation to keep two benefices "with cure, &c. which benefices are for life." So by the ſtatute 17. *Car.* 2. c. 3. it is enacted, "that the incumbents of churches

(*a*) 13. *Eliz.* c. 21.

"united

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"united must be graduates in one of our univerſities;" which union is likewiſe for life, and no perſons are capable of ſuch benefices but graduates. Therefore this Court will take notice of ſuch degrees as entitling the graduates to ſome temporal right; and if ſo, * then the queſtion will be on this return, Whether the ſentence given in the vice-chancellor's court is legal, or not?

* [153] It is admitted, that *the Doctor* was guilty of a contempt, for which they might have puniſhed him if they had proceeded in a right method; but it is certainly wrong to take away a man's freehold by any other means than *per legem terræ*. Then as to the return itſelf, it appears that there were four cauſes to ſuſpend *the Doctor*.—FIRST, In ſaying that the vice-chancellor acted raſhly, for *ſtultè agit* implies raſhly as well as fooliſhly, and in the return ſhall be taken *in mitiori ſenſu*.—SECONDLY, In ſaying that the vice-chancellor was not his judge.—THIRDLY, By taking the proceſs from the beadle.—FOURTHLY, In ſaying that the proceſs was illegal. But they do not return any cuſtom of ſuſpending or degrading; though if they had it had been void, if it was unreaſonable, as it was held in the caſe of the *City of London*, that an unreaſonable cuſtom, though confirmed by act of parliament, is void. Neither do they ſet forth what puniſhment is to be inflicted for *a contempt*, in caſe the offender had not been a graduate. Then they ſay, that the depoſitions for this contumacy were exhibited by the beadle, &c. Now by reaſon of this haſty judgment, thoſe depoſitions ought to be very plain; but it doth not appear that they were taken before a proper magiſtrate who had power to tender an oath, but only that they were taken *de contemptu prædicto*. Now the word "depoſition" does not *ex vi termini* imply that it was taken on oath, for it is a relative word, and denotes no charge (*a*); and it does not appear but that it might be taken to clear him of a contempt; and convictions are daily quaſhed for ſuch faults, where they fix no crime on the convicted; now if they had returned before whom the depoſitions were taken, it might have appeared to be before one who had no power to take them. Another part of the return was, that the power of conferring degrees is in the "vice-chancellor, maſters, and ſcholars," and ſo is the power of ſuſpending and degrading; therefore of their own ſhewing the vice-chancellor's court has no ſuch power; it is like a corporation which has power to remove a freeman, but if he is

* [154] removed by a court of a corporation it is illegal. * By the law of *England*, a man cannot be twice puniſhed for the ſame offence, but here *the Doctor* was twice puniſhed for this contempt: firſt, he was ſuſpended by the vice-chancellor's court; and afterwards, upon a grace propoſed to a congregation of doctors and heads of houſes by the ſaid vice-chancellor, he, by the advice and conſent of ſeven other doctors of the univerſity, was degraded; which is a double puniſhment; for how can that congregation take notice of the ſuſpenſion, it not coming before them either by writ of error or

(*a*) Yelv. 72. 111, 122. Latch. 39. 3. Inſt. 167.

appeal;

appeal; ſo that it was an extrajudicial cauſe, and in a very extraordinary manner, and cannot be a confirmation of the firſt ſentence, but a ſecond puniſhment independent of the firſt, which was the ſuſpenſion, and that alſo for the ſame crime, ſo that it is wrong and unjuſt. Beſides, of their own ſhewing, that court and that congregation had only a juriſdiction over thoſe who reſide in the univerſity; and therefore *the Doctor* could not be ſuſpended, unleſs he reſided there, which for aught appears muſt be taken by intendment, for it is nowhere expreſsly alledged that he did reſide there; neither do they ſhew to whom the contempt was, unleſs it ſhall be intended to that court who ſent the ſummons. It is likewiſe returned, that a proceſs iſſued to ſummon *Dr. Bentley* to appear at the next court, but they do not ſhew the nature of this proceſs, whether it was by arreſt, diſtreſs, or ſummons, which ought to have been ſet forth; neither do they ſhew where or when the next court was to be kept, or for what cauſe he ſhould appear there; neither is it alledged, that he had notice of either, or that he was in contempt; for if theſe things had been ſet forth, *the Doctor* might have an opportunity to defend his freehold. How can a man be ſaid to be contumacious to a court when he did not know when and where they aſſembled as a court? Now as to that matter, it is a conſtant rule in all caſes where a *mandamus* is granted, that the party ſhould have notice of his charge; but it does not appear by this return, that *the Doctor* was ſummoned to anſwer for a contempt; ſo that he was ſentenced without being heard, which is illegal, and againſt natural juſtice, as may appear by the caſes in the (*a*) margin. But if all the cauſes returned were true, yet none of them are ſufficient either to ſuſpend or degrade *the Doctor*, becauſe a ſuſpenſion, by their own ſhewing, muſt be for ſome reaſonable cauſe; now they do not ſet forth, that a contempt to this court was a reaſonable cauſe to ſuſpend *the Doctor*: * it is true, they have alledged a power time out of mind to ſuſpend and degrade; now this muſt be by cuſtom, for they do not pretend to any juriſdiction by the civil law. Now all cuſtoms in *England* are *primâ facie* to be intended at common law, unleſs ſpecially ſet forth to be otherwiſe, and they muſt have a reaſonable commencement, otherwiſe they are not good; but this cuſtom is unreaſonable and inconſiſtent with the common law, it being of a power to ſuſpend and degrade at pleaſure; and it is not ſufficient to ſhew that they had a juriſdiction of the cauſe, for that would deſtroy all manner of right; becauſe if it ſhould be allowed, then every corporation might ſhew that they had a power to remove or diſfranchiſe any member thereof, and give no account of the cauſe of ſuch removal or diſfranchiſement; but the conſtant

Vent. 18a.

Cro. Jac. 506. pl. 18.

* [155]

(*a*) 9. *Edw.* 4. 14. a. 39. *Hen.* 6. 32. 11. Co. 99. a. Sid. 14. pl. 7. 2. Sid. 97. Style, 446. 452. Forteſc. Rep. 206. 325. Salk. 181. pl. 1. 2. Salk. 434, 435. Ld. Raym. 225. 2. Ld. Raym. 1343. 1405 1407. 4. Mod. 33. 37. 6. Mod. 41. Ante, 3. 101. Poſt. 377. 12. Mod. 27. Stra. 567. 630. 678. Seſſ. Caſ. 172. pl. 155. 219. pl. 179. 267. pl. 210. 295. pl. 232. 353. pl. 281. Fol. 416. Caſ. of Set. and Rem. 373. 2. Barnard. K. B. 241. 264. 282.

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practice in such cases is otherwise, therefore they ought to have set forth in this return, that the contempt was a reasonable cause of suspension. Upon the whole matter, where-ever a man loses anything depending on a freehold, a *mandamus* will lie, if he has no other remedy; it was granted to a *Presbyterian parson*, and directed to a justice of peace, to admit him to take the oaths and subscribe the test, that he might be entitled by law to preach in his congregation: and therefore a peremptory *mandamus* was prayed.

IT WAS ARGUED *for the University*, and to maintain the return, that there was nothing in this case but what was usual in cases of this nature; for as in the courts of common law, if the defendant refuse to appear upon process of those courts issued out against him, then he is to be outlawed; and if it be out of the spiritual courts, then he is excommunicated; so in these courts of universities, a suspension or degradation is the only method to enforce an obedience to their authority; and though they proceed in a different manner from the course of the common law, yet, if it be warranted by any other law, or by the allowed usage amongst them, it is good. Now this method of proceeding is allowed in all the universities in *Europe*; and as they have a power to suspend, so likewise they have a power to restore the person suspended, upon his submission; and by the charter granted to this university by *Queen Elizabeth*, they have a particular power to determine all causes arising within their jurisdiction. It has been alledged on the other side, before this *mandamus* was granted, that degrees in the universities are only titles of honour, and given as the rewards
* [156] of learning* and merit. Now allowing this to be true, it is certainly a very strange inference to say, that the persons to whom such degrees are given cannot therefore lose them for a contempt, or any other demerit. Besides, these degrees are given by the university, under a tacit condition that the graduates shall conform themselves to the rules and usages there, and for that reason it is no novelty to proceed against them for disobedience to those rules, but warranted by the constant practice in all universities here and abroad. Now, to answer the objections made against this return: First, it was said, that it does not appear that there was any reasonable cause for this suspension, nor how the process issued. In answer to this objection it plainly appears, that there was a plaint levied in the court against *Dr. Bentley*, according to the custom of the university, and that according to such custom process issued against him, which must be *a citation*, because that is the first process in all ecclesiastical courts, or in cases where the proceedings are according to the course of the civil law, which is the law generally used in all universities. It is true, there were cases cited on the other side which prove, that the process must contain *the day* when, and *the place* where the court is to be held, and likewise *the cause of action*; all which were omitted in this process: the reason is, because this was a process according to the civil law, wherein such certainty is not required as if it had been a process at common law, by which the time and place of holding the court must be ascertained;

Dyer, 162. 1. Roll. 484. 2. Cro. 314. 572. 2. Bulst. 36. Cro. Car. 254. Shower, 85. 95.

aſcertained; but where the time is uncertain, as it is in all inferior courts, *viz.* when they are to be held, there is no occaſion of mentioning the day in the proceſs, becauſe the perſon ſummoned muſt take notice himſelf when the court is to be kept. As to the objection, that it does not appear that the depoſitions exhibited by the beadle to prove the contempt were taken by a proper magiſtrate, upon oath, who had power to adminiſter ſuch oath; this might be a proper objection, if the proceedings had been likewiſe at common law; but an oath in ſuch caſes is not required by the civil law, becauſe by that law it is ſufficient to ſay that it was done *ex relatione* of the officer to whom the contempt was offered; "*depoſitio*" imports an oath. If not, why ſhould an oath be neceſſary? The Court is the proper judge what ſort of evidence to proceed on: if their proceedings are different from proceedings in this court, that will be no reaſon for a peremptory *mandamus*; by the eccleſiaſtical law, their courts may proceed in ſuits by a wife without her huſband, and this court will not grant a prohibition. So the admiralty courts in *England* may execute a ſentence in a foreign admiralty given in a cauſe ariſing on land, without being prohibited by the common law; and it is what frequently happens, even in courts of common law, to order a man into cuſtody for ſpeaking * contemptuous words of ſuch courts, upon an affidavit made that the party was ſummoned, &c. As to the objection, that the cauſe of action is not ſet forth in the return for which *the Doctor* was to appear; one would think that he who made this objection had not read the return, becauſe it plainly ſets forth, that a plaint was levied by *Dr. Middleton* againſt the ſaid *Dr. Bentley*, and proceſs iſſued againſt him to appear, &c. and that *Dr. Middleton* declared for his debt, &c. And as to the objection, that there was not any contempt ſet forth, the contrary is certainly true; for it is returned, that *the Doctor* took the proceſs from THE BEADLE, which is a contempt; and this appears by a ſtatute of the other univerſity of *Oxford*, which is, that if any perſon ſhall take the vice chancellor's writ from the beadle, he ſhall be degraded, if a graduate; and if not a graduate, then he ſhall be otherwiſe puniſhed; by which it appears, that univerſity took it to be a contempt to have their proceſs taken from a beadle. It is true, it does not appear by this return in expreſs words, that it was taken from him by violence, or that it was not reſtored; but the words *de manibus ſummonitoris abſtulit* imply a taking by violence and force. Beſides, it appears by this return that *the Doctor* ſaid he would not obey the ſummons, and that the vice-chancellor acted fooliſhly, and that he was not his judge, which being ſpoken to the beadle is certainly a contempt; for if *the Doctor* had anything to ſhew why the vice-chancellor had no juriſdiction, he ought, as the law directs, to have appeared and ſhewed the cauſe, and not to tell it to the beadle, to bring their court and their proceedings into the contempt of the vulgar. It has been farther objected, that if the day and place of holding this court had been ſet forth, and notice likewiſe given to *the*

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Doctor to appear and anſwer a contempt, he might then have an opportunity of appearing and clearing himſelf from that charge; but thoſe things being omitted in the return, he could have no ſuch opportunity. In the return it is plain, that he was ſummoned to appear at the next court, and that for not appearing he was ſuſpended; which is a full anſwer to that objection; but the ſuſpenſion had been good, though *the Doctor* had never been
* [158] ſummoned. * It is true, it is againſt natural juſtice to puniſh a man without hearing him; but it is a miſtaken method of arguing to apply general rules to particular caſes; for it is ſufficient if *the Doctor* had an opportunity to be heard, and that is not denied; but it is plain that he would not be heard, for he ſpoke contemptuous words of that court where he ſhould be heard; and therefore ſince he deſpiſed their authority, there was no occaſion for a ſecond ſummons to anſwer the contempt; for the rule is, *contra veram contumaciam non amplius eſt avocandus*. Now where the civil law is the rule and guide of the Court, and they proceed according to that law, the courts in *Weſtminſter-Hall* always give credit to ſuch proceedings, otherwiſe it might be of very bad conſequence to have an inferior court proceed by one law, and to have the ſentence of ſuch court reverſed by a ſuperior court, where the proceedings are by another method, and by another law. The ſentence given againſt *the Doctor* is not ſo very ſevere as it has been repreſented, becauſe upon his ſubmiſſion, or clearing himſelf of the contempt, he might be reſtored to his degrees at any time; and this degradation, which is only a means to enforce his obedience, would be quaſhed; ſo that it is his own fault and obſtinacy if he is not reſtored. It has been ſaid on the other ſide, that a diſfranchiſement of a freeman for a contempt to the mayor's court was never yet ſeen, which is very true; but theſe caſes are far different from degradations, becauſe where a member of a corporation is diſfranchiſed, he is ſecluded from all privileges of that corporation, and the reſt of the corporate body are deprived of their intereſt in him, and of his voting in any corporate act; but it is otherwiſe in the caſe of a degradation, becauſe the perſon degraded is ſtill a member of the univerſity (for ſo is *the Doctor* in this caſe) who is ſtill head of a college. It is true, this degradation is a perſonal reflection on him, and he is thereby deprived of ſome benefit ariſing from his degrees in this univerſity, but he is ſtill a member thereof. All that was done as to his degradation was *ſecundum leges et conſuetudines univerſitatis*, who have a power finally to determine in ſuch caſes; yet that does not exclude other powers to inſpect their actions; but if they proceed according to
* [159] their known laws and cuſtoms, though a little different * from the common law, this Court will give credit to their proceedings, and not interpoſe. Now in this caſe they proceeded according to the laws and cuſtoms of the univerſity; for the vice-chancellor's court has cognizance of all perſonal actions ariſing there, and where any of the members thereof are concerned (excepting felonies), and this

this is an independent juriſdiction, excluſive of all others, time out of mind, and confirmed by act of parliament, any law, cuſtom, ſtatute, or conſtitution, notwithſtanding; and this is purely to give them leave to proceed according to the civil law. It is true, HALE, in his *Hiſtory of the Common Law*, tells us, that the king cannot give power by his charter to ſet up any juriſdiction to proceed by any other means than the common law; which ſhews, that though he cannot do it by charter, yet it may be done by act of parliament, as it was done in this caſe, on purpoſe that they might proceed by the civil law; therefore this Court will not interpoſe to examine their proceedings, whether they are right or not, becauſe that court proceeds by a different law, *viz.* by the civil law, and they have returned, that *the Doctor* was ſuſpended according to the cuſtoms of the univerſity; ſo that this ſuſpenſion muſt be according to civil law. As to the objection, that no particular cuſtom is returned for the vice-chancellor's court either to ſuſpend or degrade, and that thoſe were puniſhments not adequate to the crime, which was only a contempt; the anſwer is, that it plainly appears to be otherwiſe by the civil law, which is to be the meaſure of the puniſhment in this caſe. It has been likewiſe objected, that thoſe degrees confer a temporal right on thoſe to whom they are granted. It is true, thoſe degrees are granted by virtue of a power given by the crown, as all other honours and precedencies are; and the granting them is but the diſpoſition or order of the precedency included in that liberty given by the crown in founding a college, like a corporation, which likewiſe is founded by virtue of the king's grant. Now all collateral qualities tacked by the parliament to thoſe degrees do not alter the power of the univerſities to diſpoſe them as matters of precedency, nor alter the nature of thoſe very degrees; as if an act of parliament ſhould be made, that no perſon ſhould be capable of ſuch benefices but thoſe who were bred at one of the ſchools at *Eaton* or * *Weſtminſter*, would ſuch a ſtatute make any alteration in the diſcipline of thoſe ſchools, but that ſtill they might give precedency to one ſcholar before another, without the interpoſition of this court? and the univerſity itſelf is but one great ſchool, viz. *ſchola illuſtris*. The caſe of holy orders is ſtill of a higher nature, and in conſequence thereof has a greater temporal right; yet that right may be taken away by a ſentence in another court, and not ſubject to the control of this or any other temporal court; as, for inſtance, the *Biſhop of St. David's (a)* was degraded in the ſpiritual court for ſimony, and in conſequence of ſuch degradation loſt his barony; but this Court would not interpoſe. So likewiſe where any perſon is excommunicated, or where a chancellor grants a ſequeſtration to enforce an obedience to the eccleſiaſtical law, no *prohibitions* or *certioraris* will lie. So a *feme covert* may ſue in the ſpiritual court without her huſband; and this being allowed by their law, this Court will not interpoſe. So juſtices of peace have power, by

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(a) Salk. 106. 134. 294.

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Rol. Abr. 530. 553. Sid. 71. T. Raym. 3. Lev. 267 4 Mod. 160. Ventr. 32.

ſeveral ſtatutes, *finaliter determinare*, and that in a ſummary way and method different from the common law; and this Court will give credit to their proceedings, if they act accordingly. Now this ſuſpenſion is no more than an amotion by virtue of a clauſe in their charter; ſo that if the cauſe was within their juriſdiction, a *mandamus* cannot be granted for any irregularity, for that is altogether out of the caſe, becauſe this Court is not to enquire thereof, where the cauſe is within the juriſdiction of the civil law; and therefore in the twelfth year of *William the Third*, this Court would not interpoſe in *Dr. Groenvelt's Caſe*, who was fined and impriſoned by the College of Phyſicians, they having power by a ſtatute ſo to do. If a man be excommunicated who was never cited, this Court will not grant a prohibition. The proper remedy is by appeal, it being an error in their proceeding, for an appeal lies *de nullitatibus*. So if an act of parliament giving juſtices of peace power to convict, enact that no *certiorari* ſhall be brought, the perſon convicted has no remedy but by action on the caſe, if the conviction be malicious. This charter, which created the vice-chancellor, having excluſive clauſes, the Court ought not to queſtion the regularity of their proceedings; but an appeal may be brought in the Senate. It has been objected, that this ſuſpenſion is no more than an amotion by a corporation in common caſes, ſo it could not be done by the vice-chancellor's court, no more than a man can be removed by a court of a corporation. But this objection is wrong; for where the body of the univerſity are judges, as in this caſe, there the vice-chancellor is only their *locum tenens* in order to execute juſtice; * and the Univerſity is active in him who hath a delegated power to hold courts before the whole body, and a part is implied to be acted by the whole corporate body by their law, as the *graviores cauſæ*, ſuch as granting degrees or depriving; and it is ſet forth, that their court has power to ſuſpend or deprive, and to reſtore upon ſubmiſſion; but when *the Doctor* has contemned that court, they may certainly ſuſpend him without a ſecond ſummons, eſpecially ſince the contempt was to that court by which he was ſuſpended. It was objected, that he has no remedy but by a *mandamus*; for though he might be willing to ſubmit, yet the vice-chancellor might never call a court, and it is wholly in his power not to call one. Now as to that matter, there is a conſtant call of two ſuch courts every year. Beſides, it is in his power, upon extraordinary caſes, to call a convocation at any other time; and this appears in the very return: but if it had not been ſet forth, it is implied by the courſe of the civil law; for by that law, all puniſhments for contumacy are, from the nature of them, temporary, though impoſed in general terms; ſo that this univerſity has proceeded as uſual, and as all other univerſities in *Chriſtendom*: and it is neceſſary in ſuch caſes to uſe ſome extraordinary juriſdiction, where young perſons meet together from all places in the moſt unruly part of their lives; otherwiſe it would be of very ill conſequence if the governors could not enforce an obedience without being ſubject to

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the control of this Court. Upon the whole matter, *the Doctor* knows that he is degraded, and for what cauſe, and he ought to have made his ſubmiſſion before he moved for a *mandamus*; and if that had been done, he might have no occaſion to apply himſelf to this Court.

PRATT, *Chief Juſtice.* This is a caſe of great conſequence, both as to the property, the honour, and the learning, of this univerſity, and concerns every graduate there, though at preſent it is the caſe only of one learned man, and the head of a college. The queſtion is, Whether the Univerſity can ſuſpend and degrade, and by what rules they may proceed in either or both of theſe caſes? As to this matter, it is allowed they may ſuſpend or degrade for a reaſonable cauſe; but then the cauſe muſt be ſpecially ſet forth, that the Court may judge whether it is reaſonable, and according to law. And upon this ground it is, that a return of a ſuſpenſion for contumacy generally will not be good, for the particulars of the contumacy ought to be ſpecified. 5. *Rep.* 57. * It is agreeable to law, that a man ſhall not be deprived of his property without being heard, unleſs it be by his own default; but it is hard that it ſhould be in the power of one man to ſuſpend or degrade another without any appeal; for if he ſhould err, as all men are ſubject to error, then the perſon ſuſpended or degraded has no remedy. It is allowed, that this Univerſity has a juriſdiction in ſeveral caſes; and this Court will ſupport them in the exerciſe of ſuch juriſdiction, if they do not exceed their proper bounds and limits. Now as to the return, there are ſeveral cauſes ſet forth both for the ſuſpenſion and degradation, *viz.* in ſaying, "that he would not obey the ſummons; that it was illegal; that "the vice-chancellor *ſtultè egit*; and that he was not his judge;" and all this ſpoken to a beadle who ſerved the proceſs of their court, and in a very indecent manner, in diminution of the authority thereof, and to make it ridiculous, which is conſequently a contempt thereof; and if the like had been done to an officer of this court, it would have been accounted a great indignity, and the perſon ſhould be puniſhed; but then the matter muſt be brought before the Court in a proper manner: and whether that was done in this caſe is now to be determined. Now by this return it appears, that depoſitions for a contempt were exhibited by the beadle, but it does not ſhew that thoſe depoſitions were taken before a proper judge; and this being the foundation of the degradation, it does not appear to this Court that they had any power to degrade *the Doctor*. But admitting they had ſuch a power, then the next thing to be conſidered on this return is, whether the cauſe returned is ſufficient to juſtify this degradation: and if it was, then whether it was well returned. * They return, that they had power to degrade for a contempt, and this was given to them by a charter of *Queen Elizabeth*, and for any other reaſonable cauſe: now the cauſe returned was neither, for it was not a contempt to the Univerſity, but to the vice-chancellor's court; it is like a contempt to a mayor, which can never be ſaid to be a

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contempt to the whole corporation; therefore, though they might degrade for a contempt to the Univerſity, it cannot be inferred from thence, that they may degrade for a contempt to a private court of that univerſity.

FORTESCUE, *Juſtice.* The words are "a contempt to the court," for which he ought to have been committed if he had been preſent in court; and if not, he ought to have been bound to his good behaviour. I do not ſee how a deprivation for this cauſe is agreeable to reaſon or juſtice: many cuſtoms of the Univerſity have been adjudged void. It is a rule, that all cuſtoms ſhall be certain. Now this cuſtom to deprive *pro contumaciâ* is uncertain as to the meaning of the word "contumacy," whether it means contumacy to the congregation, to the vice-chancellor, to this court, or to the Univerſity; whether to *Dr. Gooch* as head of the college, or as judge of the inferior court.

PRATT, *Chief Juſtice* (as to this matter). The words are improper and indecent: we ſhould puniſh all perſons who ſhould ſpeak ſo diſreſpectfully of our proceſs, and might bind them to their good behaviour; but the authorities ſeem too ſtrong to allow a power to remove a perſon from his freehold for ſuch words.

EYRE, *Juſtice*, ſaid, that he was not ſatisfied that the Univerſity can deprive for a contempt to the vice-chancellor; for a contempt to the vice-chancellor is no contempt to the Univerſity; they cannot deprive for all contumacies, nor have they returned a power to deprive for a contumacy to the vice-chancellor. It muſt be intended, being general "*propter contumaciam*," to extend only to contempts to the Univerſity. Suppoſe, in any other corporation a member ſhould offer a contempt to an inferior court, can the corporation deprive him? No: they can only puniſh him as other inhabitants. A proper puniſhment for a contempt is fine and impriſonment, but not loſs of freehold; an officer of this court ought not to loſe his office for contemptuous words to the Court. A tenant to the lord of a manor or diſtrict cannot loſe his eſtate for non attendance at any court.

FORTESCUE, *Juſtice.* Though a degree in the Univerſity is only a civil honour, yet intereſt and property being the conſequence of ſuch degree, the Court conſiders it as ſuch with all its attendances. It is like the caſe of an alderman, which of itſelf is no profit, only by conſequence. All degrees were originally given by the crown; and though the preſent right of conferring them is preſcribed for by the Univerſity, yet that preſcription muſt be preſumed to be founded upon a right derived by authority from the crown; ſo that a perſon advanced to the degree of a Doctor, &c. may be eſteemed to be advanced by the king. There were no degrees among the *Grecians* or *Romans*, nor among the firſt Chriſtians; they began about the twelfth or thirteenth century, and have been ſince attended with great privileges and profits. *Univerſitatis* is the proper *Latin* word for Corporation. A learned man

man of this univerſity told me, that there were no degrees ever granted there until the univerſity was a corporation. The ſeminaries for education of youth were antiently held in the cathedrals of the churches of the firſt chriſtians. Beſides, where any perſon is degraded for a contumacy, it ought to be by that court to whom the contempt was offered; but it is not pretended by this return, that the vice-chancellor's court had any power to degrade. Neither does it appear that *Dr. Bentley* was ever ſummoned to anſwer this contempt; and it is againſt natural juſtice to deprive a man of his right before he is heard; therefore if there was a cuſtom ſo to do, ſuch cuſtom would be abſolutely void; and it is a thing of daily experience to grant prohibitions to ſpiritual courts, if they deny the defendants a copy of the libel, becauſe ſuch denial is againſt natural juſtice. And now to offer a common inſtance, *viz.* Suppoſe an officer of this court ſhould ſhew any contempt thereof, could he be deprived of his office for ſuch contempt? Certainly he could not. It is true, they who have argued for the Univerſity inſiſted, that the proceedings there are according to the civil law, and this they have done to juſtify the ſuſpenſion, without being ſummoned to anſwer the contempt; but it does not appear upon the return (upon which this Court is * to judge), that they proceed there by the civil law; and if ſo, then the Court muſt intend that they proceed by the common law, which they have not done, for there is no manner of proof that *the Doctor* was ſummoned to appear to anſwer the contempt; and it can never be ſaid, that a court which proceeds according to the common (*a*) law, ſhall ſuſpend or degrade a perſon without being heard or ſummoned. It is ſaid likewiſe, that this was not a proceeding by virtue of a charter alone, but by a charter confirmed by act of parliament. Now admitting that to be true, it muſt be granted that convictions, even upon acts of parliament, are frequently quaſhed, for not ſummoning the perſons convicted, though not required by the ſtatute, becauſe it is ſtill againſt natural juſtice to convict without hearing. The want of a ſummons is an objection that can never be got over. Had the cuſtom been returned to deprive without ſummons, it had been void, as againſt natural juſtice. If a juſtice of peace convict any man without a ſummons, ſuch conviction is void. I heard a learned civilian ſay, that God himſelf would not condemn *Adam* for his tranſgreſſion until he had called him to know what he could ſay in his defence. *Gen.* iii. 9. Such proceeding is agreeable to juſtice. Admitting the Univerſity has a juriſdiction, yet this Court will inquire what they have done, and how they have uſed that juriſdiction, as it was done in * *Buſhel's Caſe*, where it was inſiſted, that the merits of the cauſe could not be inquired into upon the return of a *habeas corpus*, but it was over-ruled; and this Court cannot affirm the proceedings in this caſe without

Eſp. Dig. 682.

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Stra. 567. Seſſ. Caſ. 219. pl. 179.

* Vaugh. Rep.

(*a*) By which law, FORTESCUE, *Juſtice*, ſaid, property was infinitely more preſerved than by any law in the whole world.

over-ruling

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over-ruling *Buſhel's Caſe*, and ſeveral other authorities of the like nature.

For which reaſons THE COURT was unanimous in granting a peremptory *mandamus*; and in *Eaſter Term*, in the tenth year of *George the Firſt*, *the Doctor* was reſtored to his degree.

Caſe 95.

Anonymous.

In what caſe homicide in the proſecution of an illegal act ſhall be murder.

AT THE SESSIONS in THE OLD BAILEY held there on the ninth day of *April*, in the ninth year of *George the Firſt*, where ſome of the Judges of the common pleas were preſent, this caſe happened:

Caſes in Cro. Law, 6. 106.

Two men were beating another man in the ſtreet, in the night-time. A ſtranger paſſing by at the ſame time, ſaid, "I am "aſhamed to ſee two men beat one." Thereupon one of thoſe who was beating the other, ran to the ſtranger in a furious manner, and with a knife which he held in his right hand, gave him a deep wound, of which he died ſoon after.

And now both the other were indicted as principals for the ſaid murder.

But THE JUDGES were of opinion, that becauſe it did not appear that one of them intended any injury to the perſon killed, he could not be guilty of his death, either as principal or acceſſary. * [165] It is * true, they were both doing an unlawful act, but the death of the party did not enſue upon that act.

So he was acquitted and the other was found guilty; and this agrees with the caſe of *The King v. Thompſon* (*a*).

(*a*) Kely. 66.

Caſe 96.

Anonymous.

The goods of another ſtolen out of a ſhop is not felony within the ſtatute 10. & 11. *Will.* 3. cap. 23.

Caſes in Cro. Law. 18. 43. 125. 248.

AT THE SAME SESSIONS another man was indicted on the ſtatute 10. & 11. *Will.* 3. c. 23. for ſtealing a ſhirt out of a ſhop. The ſtatute enacts, "that any perſon who by night or day ſhall, "in any ſhop, warehouſe, coach-houſe, or ſtable, privately and "feloniouſly ſteal any goods of the value of five ſhillings or more, "though ſuch ſhop, &c. be not broke open, and though the "owner, or any other perſon, be, or be not in ſuch ſhop, or that "ſhall aſſiſt in committing ſuch offence, being thereof convicted, "ſhall not have the benefit of the clergy."

THE CASE was thus: A ſhirt which was the property of *T. S.* was left in the ſhop of *W. R.* to be ſent to a ſempſtreſs to mend it, and was ſtolen by the priſoner out of the ſaid ſhop.

The queſtion was, Whether this was felony within the ſtatute, for which the offender could not have the benefit of clergy?

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THE JUDGES were of opinion, that it was not; for the ſtatute was made as a remedy for the owners of ſhops to preſerve their own goods, which might be left there by way of trade, but did not extend to goods caſually loſt there, and conſequently the ſtealing ſuch goods to the value of five ſhillings was not felony without benefit of clergy. ANONYMOUS.

And THE JURY gave a verdict accordingly.

The King *againſt* Powell and Others. Caſe 97.

A RULE was made on the defendant *Powell* and one *Jones* to ſhew cauſe why AN INFORMATION, in nature of a *quo warranto*, ſhould not go againſt them to ſhew by what authority they claimed to be capital burgeſſes of the borough of *Brecknock*, &c. and the like rule on *Mr. Price*, to ſhew by what authority he claimed to be RECORDER of that borough.

Formerly fifteen years poſſeſſion of a corporate office would not prevent an information *quo warranto* to try the *mere right*.

S. C. poſt. 201, 291. S.C. 2. Stra. 782. S. C. 3. Bro. P. C. 428.

IT WAS OBJECTED againſt the capital burgeſſes, that they were never duly choſen burgeſſes, and by conſequence could not be capital burgeſſes.

Now, admitting that matter to be true, yet *Powell* being a burgeſs *de facto* ever ſince the year 1708, and *Jones* being * another ſuch burgeſs ever ſince the year 1712, it would be of fatal conſequence to this borough, after ſo long an acquieſcence, to make all the corporate acts done by them during all that time void. And probably theſe men may be purſued a little farther; for the next ſtep may be, whether they were ever admitted to their freedom; or whether they ſerved ſeven years apprenticeſhip, which things may be very hard to prove upon a *quo warranto*. As to the recorder, he was elected the twenty-ninth of *April* 1722; but finding that election was not good, he was re-elected the twentieth of *May* following, and before he was ſworn into the office; ſo that there is no colour to extend this rule to him. * [166]

E contra. The long acquieſcence, as ſuggeſted on the other ſide, can be no colour againſt this rule, which was made on the mere right; and it ſeems a little ſurpriſing that it ſhould be offered againſt the rule, becauſe length of time will never eſtabliſh a right which was gained by uſurpation. Now it is plain, that theſe men could never be *capital* if they never were *legal burgeſſes* (*a*). It is true, in caſes of not taking the ſacrament, or the oaths of allegiance and ſupremacy, the Court will intend that they were duly taken after a long acquieſcence (*b*); but a right ſhall never be intended when the merits of it are controverted (as it is in this caſe), and no collateral part diſputed.

(*a*) See ante, 134. Rex *v.* Newling, 3. Term Rep. 310.
(*b*) See Rex *v.* Williams, 1. Stra. 677. Rex *v.* Smith, 3. Term Rep. 573.

And

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And THE COURT being of that opinion, the rule was made absolute as to the *capital burgeſſes* (*a*), but diſcharged as to *the recorder*, becauſe he did not rely on his firſt, but on his laſt election.

(*a*) The rule of the Court was never to allow an information *quo warranto*, after a corporator had been *twenty years* in poſſeſſion of his corporate franchiſe, 1. Burr. 433 4. Burr. 1962. Cowp. 58. 75. 2. Term Rep. 767. But this being thought too long a period, Rex v. Stacey, 1. Term Rep. 4. and as many informations of this kind had been granted previous to the making of the rule, though conſiderably within twenty years, 3. Term Rep. 311. the Court reſolved to limit their own diſcretion, in granting applications of this nature, to ſix years, 4. Term Rep. 284. And now by 32. *Geo.* 3. c. 58. it is enacted, "that to any "information *quo warranto* the defendant "may plead *in bar*, that he has held the "office or franchiſe for *ſix years* preceding the information; and that no title "derived under any election ſhall be "impeached, by reaſon of any defect of "title of the perſon or perſons electing, "if ſuch perſon or perſons were in poſſeſſion *de facto* of his or their franchiſe "or office ſix years before the filing of "the information."

Caſe 98. Lilly *againſt* Hodges.

If *A.* and *B.* covenant for themſelves and for each of them with *C.* and *D.* that they will receive certain rents, and that they and each of them will pay a moiety thereof to each of them, the ſaid *A.* and *B.* an action of covenant by *A.* againſt *C.* aſſigning a breach that *C.* and *D.* had received ſo much and had not paid him the moiety thereof, is good.

* [167]

5. C. 1 Stra. 553. 5. Co. 19. Noy, 86. 1 Salk. 137. 10. Eliz. 50. 1 Sp. Dig. 288. 2. Burr. 1190. 5. Com. Dig. "Pleader" (2. V. 2.).

THE DEFENDANT and one *Griffith* covenanted for themſelves and for each of them, and for their executors and adminiſtrators, and for each of their executors and adminiſtrators, with *Lilly* and *Cardonel*, to receive the rents due to the plaintiff *Lilly* and one *Cardonel* in *Ireland*, and likewiſe that they and each of them would pay a moiety thereof to each of them, the plaintiff and *Cardonel*.

AN ACTION OF COVENANT was brought againſt the defendant *Hodges* alone by the plaintiff *Lilly*, for his moiety; and the breach aſſigned was againſt both the covenantors, "that the defendant "*Hodges* and *J. Griffith* received ſeven thouſand pounds, and "that the defendant did not pay the moiety to the plaintiff, nor "account to him for the rents, &c." * and upon the general iſſue pleaded, the plaintiff had a verdict.

IT WAS NOW MOVED *in arreſt of judgment*, that this action is not maintainable in this manner: it muſt be either an action againſt the defendant alone, charging him for his own act, or againſt both the defendant and *Griffith*, charging them on their joint act. This action is neither ſeparate nor joint, but both confounded together; for the receipt of the money is laid to be by both.—Beſides, the breach is aſſigned againſt both the covenantors; which is ill, becauſe the action is brought againſt one, and by one of the covenantees, when it ought to have been brought by both upon the joint covenant.

THE COURT. Two perſons may engage for the acts of both, as well as for the acts of one, and each may covenant for the other as well as for himſelf; but that which is fatal in this action is, that the covenant was made to two, ſo they both ought to join, for otherwiſe one may recover, and ſo may the other, ſo that the covenantor would be doubly charged.

THE

THE COURT, however, were all of opinion, that the plaintiff ſhould take his judgment, becauſe the defendant had covenanted for the acts of his companion as well as for his own acts; and the breach and non performance of the covenant being laid jointly againſt both the covenantors, it is well enough. Lutt *againſt* Hodges.

THE MOST MATERIAL OBJECTION was, that both the covenantees ought to have joined in bringing this action, and that it ſhould not be brought by one of them alone.

But IT WAS ADJUDGED, that the action is ſevered by the ſubſequent covenant, by which the defendant and the ſaid *Griffith* covenanted each of them to pay a ſeveral moiety of the rents; for though the covenant was joint in the beginning of the deed, *viz.* they both covenanted to receive the rents, yet it was ſevered by the apparent intention of the parties by that ſubſequent clauſe of paying the moieties to each of the covenantees; and if that had been omitted in this deed, then the action muſt have been joint againſt both, but now it is ſevered, and well brought againſt one by one.

* [163]

* Hinton *againſt* Parker.

Caſe 99.

PROHIBITION. The caſe was this: The widow of the teſtator exhibited AN INVENTORY of his goods in the *prerogative court* (*a*). Complaint was thereupon made by *a legatee*, that ſeveral goods of which the teſtator died poſſeſſed, naming them, were left out of this inventory, and an account was demanded to be given what became of thoſe goods.

An inventory may be falſified at the ſuit of *a legatee*, but not of *a creditor*.

Swinb. 228. Tothil, 183. 12. Mod. 346. 1. Vezey, 75. 2. Vezey, 193.

The defendant pleaded, that the ſaid goods were diſpoſed by the teſtator in his life-time, and by his leave; and on this plea the ſpiritual court gave coſts, for that it was a confeſſion of more aſſets than were in the inventory.

Whereupon the defendant now moved for *a prohibition*, on a ſuggeſtion, that the Court proceeded to falſify AN INVENTORY which they had not power to do, becauſe by exhibiting thereof their juriſdiction was determined.

THE COURT was of opinion, that the ſpiritual court could not falſify AN INVENTORY at the ſuit of *a creditor* (*b*); but at the ſuit of *a legatee* they might (*c*).

(*a*) See 21. *Hen.* 8. c. 5.

(*b*) See Catchſide *v.* Ovington, 2. Burr. 1922.

(*c*) By the civil law, if the creditors or legataries, or any other perſon concerned, ſhould diſcover any thing omitted, or ſhould miſtruſt it, they will be admitted to prove the omiſſions and frauds which they ſhall alledge. Dom. 596. tit. 2. ſect 4. edit. 1737.—NOTE *to the former edition*. See alſo 4. Burn's Ecc. Law, "Wills."

The

Caſe 100. The Pariſh of St. Olave *againſt* The Pariſh of All-hallows on the Wall.

If an apprentice ſerve two years in one pariſh, and is turned over by *verbal agreement* to a maſter in another pariſh, and there ſerve out his time, he is ſettled under the indentures, in the laſt pariſh.

ONE *Underwood* was bound apprentice to a farrier in the pariſh of *St. Olave*, and having ſerved two years of his time in that pariſh, was, by a verbal agreement between his maſter and one *Thomas Dennis*, ſent to ſerve the ſaid *Dennis* in the pariſh of *All-hallows on the Wall* in *London*, and there he ſerved him five years; and afterwards coming back into the pariſh of *St. Olave*, and being likely to be chargeable, he was removed by an order of two juſtices to the pariſh of *All-hallows*, which order was confirmed upon an appeal to the next ſeſſions; and both the orders were removed by *certiorari* into the court of king's bench.

* [169]

S. C. 1. Stra. 554. S. C. Sett. and Rem. 114. S. C. 1. Seſſ. Caſes, 275. 2. Stra. 1001. 2. Seſſ. Caſ. 176. pl. 138. Fol. 267. Forteſc. Rep. 308. Caſ. of Set. and Rem. 16. pl. 23. Ld. Raym. 683.

IT WAS OBJECTED, that both of them ſhould be quaſhed, becauſe the apprentice was not turned over by writing to the maſter who dwelt in *All-hallows*; and if ſo, then he could not gain a ſettlement * there upon account of his apprenticeſhip, becauſe it cannot be ſaid, that he ſerved in that pariſh as an apprentice.

THE COURT. This very point was determined in *Michaelmas Term*, in the third year of *George the Firſt*, in the caſe of the pariſh of *St. Leonard Shoreditch v. Trinity Pariſh* (*a*); and it was thus: An apprentice bound to a maſter living in one pariſh, and ſerving ſome part of his apprenticeſhip there, was, by a verbal agreement made between his maſter and another, to ſerve out his time with that other maſter in another pariſh; and this was adjudged a good ſettlement in that other pariſh where he laſt ſerved; for it ſhall be ſtill intended, that he ſerved his firſt maſter upon that agreement, and that it was but a continuance of his apprenticeſhip.

And ſo it was adjudged in the principal caſe (*b*).

(*a*) Stra. 10. 1. Seſſ. Caſes, 112. S. C. 2. Bott P. L. 578.

(*b*) St. John Baptiſt *v.* St. James, 2. Bott P. L. 563. Stoke Fleming *v.* Bury Pomeroy, 2. Bott P. L. 564. Rex *v.* St. George's Hanover-ſquare, Burr. S. C. 12. Rex *v.* Eaſt Budgford, Burr. S. C. 133. St. Peter's *v.* Stoke Fleming, Burr. S. C. 250. 1. Wilſ. 96. Rex *v.* Clapham, Burr. S. C. 266. Rex *v.* Fremington, Burr. S. C. 416. Rex *v.* St. Luke's, Burr. S. C. 542. Rex *v.* Taviſtock, Burr. S. C. 578. Rex *v.* Charles, 2. Bott P. L. 588. Rex *v.* Ideford, Burr S. C. 821. Rex *v.* Stockland, Dougl. 70. Rex *v.* Langham, Cald. 126. Rex *v.* Bradnincle, 2. Bott P. L. 594. Rex *v.* St. Mary Lambeth, 2. Bott P. L. 595. Rex *v.* Sandford, 1. Term Rep. 281. Rex *v.* Bradſtone, 2. Bott P. L. 599. Rex *v.* Holy Trinity, 3. Term Rep. 605. And ſee Mr. Conſt's edit. of Bott's Poor Laws, page 578. ſect. vi. where all theſe caſes are collected.

Caſe 101. The Pariſh of St. Giles's in Reading *againſt* The Pariſh of Everſly, Blackwater.

If a perſon born in the pariſh of *A.* be put apprentice in the pariſh of *B.* and after ſerving two years of his time, on his maſter becoming bankrupt, he return to the pariſh of *A.* marries, has children, and dies without having gained a ſettlement there, his widow and children are ſettled in the pariſh of *B.* although neither of them were ever there during the life-time of the huſband and father.—S. C. 2. Ld. Ray. 1332. S. C. Sett. and Rem. 110. S. C. Shaw P. L. 226. S. C. 2. Seſſ. Caſes, 116. S. C. 1. Stra. 580. S. C. And. 350.

WILLIAM CHESTERMAN, the father of the children now removed by the order of two juſtices of peace, was born in the pariſh of *St. Giles's* in *Reading*, and bound appren-

tice

tice in the parish of *Eversly*; and having served two years of his apprenticeship there, his master broke, and then this apprentice came back to *Reading*, which was the place of his birth, and there he married, and had these children, and in some time afterwards he died. There were endeavours in his life-time to remove him to *Eversly*, where he had served two years of his apprenticeship, but he was not actually removed. But after his death his widow and children were, by order of two justices, sent to the said parish of *Eversly*.

THE PARISH OF ST. GILES'S IN READING *against* THE PARISH OF EVERSLY, BLACKWATER

Upon an appeal to the next sessions, that order was quashed, and an order made, that they shall be sent back to the parish of *St. Giles's*, because the wife before her marriage had a lawful settlement there. And now both these orders being removed into the court of king's bench by *certiorari*,

IT WAS MOVED to quash the order of sessions, for that the settlement of the children ought to follow the settlement of the father *(a)*.

THE CHIEF JUSTICE was of opinion, that during the life-time of the father the settlement of the children must be where he was settled, and thither they may be sent; * but if he had no legal settlement, then the children must be sent to the place where they were born. Now the father of these children being dead, and some attempt being made to remove him in his life-time, though he was not actually removed, yet that shews his settlement was contended; and the children being born under such a contested settlement, must be sent to the place of their birth; though it might have been otherwise, if there had been no contest *(b)*.

* [170]

But TWO JUDGES were of a contrary opinion, *viz.* that after the death of the husband who was the father of these children, both their mother and the children ought to be sent to the place where he had a lawful settlement; and that his death (in this case) made no alteration as to the settlement; for wherever the husband and father had a legal settlement, the widow and children gain a settlement there. Nor doth it alter the case, though the wife had another settlement before her marriage, because by her marriage that settlement was lost, and birth gains a settlement of the children in no case but where the settlement of their father or mother is not known (excepting only in cases of bastardy), and there it gains a settlement only *primâ facie* until the legal settlement is known, and no longer; and the reason is, because the children

(*a*) T. Raym. 476. 2. Salk. 528. pl. 12. 6. Mod. 87. Forteſc. Rep. 322. Set. and Rem. 241. pl. 281. 244. pl. 282. 3 Salk. 259. pl. 14. Caſ. Temp. Holt, Ch. J. 578. pl. 15.

(*b*) Lord *Raymond*, Lord *Forteſcue Aland*, *Foley* and *Andrews*, all report that PRATT, *Chief Juſtice*, entirely agreed with the other Judges, who were all upon the bench, and unanimous. 2. Ld. Raym. 1332. Forteſc. Rep. 320. Fol. 398. Andr. 350. But Sir John Strange ſays, that three Judges were of opinion againſt RAYMOND, *Juſtice*, Stra. 580. However, Lord Raymond hath himſelf informed us that he agreed with his brothers, 2. Ld. Raym. 1332.—NOTE *to the former edition.*

ſhould

THE PARISH OF ST. GILES'S IN READING *againſt* THE PARISH OF EVERSLY, BLACKWATER.

ſhould not be vagrants. It is true, a ſervant may be ſettled in a place where his maſter had no ſettlement; as if he was a viſitor or ſcholar; for that ſervice which is the foundation of his ſettlement is entirely independent of his maſter; but that is not like the preſent caſe, *viz.* the ſettlement of a child by virtue of the ſettlement of his parents; becauſe by the law of nature they are to provide for their children, ſo that their ſettlement muſt neceſſarily depend upon that of their parents (*a*).

Afterwards by the unanimous opinion of THE COURT, the order of ſeſſions was quaſhed, and the order of the juſtices confirmed.

(*a*) See Coxwell *v.* Shillingford, Fort. 313. Reg. *v.* Clifton, 19. Viner Abr. 382. Rex *v.* St. Giles, Fort. 269. Rex *v.* Ironaſton, 2, Burr. 153. Rex *v.* St. Botolph's, 2. Burr. S. C. 367. And ſee Mr. Conſt's edit. Bott P. L. 2. vol. 19. to 29.

* [171]

Caſe 102.

* Grey *againſt* Mendez.

To *indebitatus aſſumpſit* brought by aſſignees of a bankrupt, if the defendant plead *non aſſumpſit infra ſex annos*, the plaintiff cannot reply the bankruptcy and aſſignment made within ſix years, for the ſtatute continues to run from the time of the original promiſe to the bankrupt, notwithſtanding the bankruptcy intervenes.

S. C. 1. Stra. 556.
S. C. Caſ. in Eq. 171.
3. Peer. Wms. 143.
4. Term Rep. 300. 306.

INDEBITATUS ASSUMPSIT brought againſt the defendant by *an aſſignee* of commiſſioners of bankrupts. The defendant pleaded the ſtatute of Limitations, "*non aſſumpſit infra ſex annos*, "*et ſic nil debet.*" The plaintiff replied, that the aſſignment by the commiſſioners, &c. was made to him on ſuch a day, in the fourth year of the reign of *George the Firſt.* The defendant demurred to the replication.

IT WAS ARGUED *for the defendant*, that the replication was ill, becauſe the plaintiff did not ſet forth how the perſon became a bankrupt, *viz.* that he was indebted to any perſon, &c. and abſconded, or had done any other act of bankruptcy; but if he had ſet forth this matter, it does not appear by the pleadings that the defendant made any promiſe to the bankrupt himſelf within ſix years, or that the caſe of bankrupts was within the ſaving of the ſtatute of Limitations, by which it is enacted, "that actions on "the caſe for ſlander muſt be commenced within two years after "the words ſpoken; and all actions of treſpaſs, of aſſault, battery "and wounding, and falſe impriſonment, muſt be commenced "within four years after the cauſe of ſuit, and all other actions on "the caſe, actions for account (other than ſuch as concern mer-"chandize), actions of debt, detinue, treſpaſs, trover and replevin, "muſt be brought within ſix years after the cauſe of ſuch actions "and ſuits, and not after." But the right of action in the caſes aforeſaid is ſaved to "infants, *feme coverts*, perſons *non compos* "*mentis*, perſons impriſoned or beyond ſea, ſo as they commence "their ſuits within the times above limited reſpectively, after "their imperfections removed;" but the right of *bankrupts* is not mentioned.

THE

THE COUNSEL *for the plaintiff* (the aſſignee) admitted this; but they inſiſted, that the right to this action was a new right veſted in him by act of parliament.

GREY *againſt* MENDES.

To which it was anſwered, AND SO RESOLVED *by the Court*, that the ſtatutes of bankruptcy transfer the right to *the aſſignee*, but it is no more than the old right which the bankrupt had before he committed any act of bankruptcy, * and therefore the aſſignee muſt take it in the ſame plight and condition as the bankrupt himſelf had it; and ſo it has been adjudged in the caſe of *Maſon v. Plunkett*, that the aſſignee was in the ſame condition, as to the right, with the bankrupt himſelf, and conſequently if he was barred by the ſtatute of Limitations, ſo ſhall the aſſignee (*a*).

Cro. Car. 139. 349. 513. Lev. 191. 2. Lev. 166. Sid. 305. 2. Mod. 212.

* [172]

(*a*) Same Point, Aſhbrook *v.* Manley, Comb. 70. South Sea Company *v.* Wymondſell, 3. Peer Wms. 143.

Jones *againſt* Thurloe. Caſe 103.

TROVER brought by *a common carrier* againſt *an inn-keeper*, for keeping the plaintiff's horſe, and converting him to his own uſe. The defendant pleads, that he is *an inn-keeper*, and that the carrier owed him ſo much money for horſe-meat at ſeveral times (all of which he ſet forth in his plea), and that by the cuſtom of the realm, *an inn-keeper* may detain horſes for their keeping; and that he, this defendant, on ſuch a night, detained the plaintiff's horſe for what was due to him, &c. which is the ſame trover and converſion of which the plaintiff complained, &c.

An *inn-keeper* has a right to detain a horſe for the expences of his keep; but he cannot ſell the horſe and by that means pay himſelf; and if by ſuffering the horſe to depart, or by any other means, he gives credit to the owner, he cannot afterwards detain him upon his coming again into his poſſeſſion.

THE COURT, upon a demurrer to this plea, was of opinion, that by the *cuſtom of the realm*, if a man lie in an inn one night, the inn-keeper may detain his horſes until he is paid for the expences; but if he give him credit for that time, and let him depart without payment, then he has waived the benefit of that cuſtom by his own conſent to the departure, and ſhall never afterwards detain the horſe for that expence. For this cuſtom is founded on the hardſhip of the inn-keeper's caſe to ſue for every little debt, or on a greater hardſhip, that he may not know where to find him who was his gueſt after he is gone; therefore when he has waived that privilege which the law gives him, he muſt rely on his other agreement. Now, in the principal caſe, *the inn-keeper* having ſeized his horſe for the expences of *ſeveral nights*, and not for *one night*, and no more (which he might lawfully do), ſuch ſeizure is not lawful, and by conſequence it is a good evidence of the converſion.

S. C. 1. Stra. 557. Moor. 876. 2. Roll. Abr. 85, 86. 3. Bulſt. 268. 1. Roll. Rep. 449. 1. Salk. 388. 2. Brownl. 254. 2 Ld. Ray. 752. Eſp. D.g. 584. 2. Show. 161.

THE CHIEF JUSTICE, in the argument of this caſe, held, that though the inn-keeper might detain a horſe for his meat for one night, yet he could not ſell the horſe and pay himſelf; if he * did, it was a converſion (*a*), for he is not to be his own carver.

* [173]

(*a*) 1. Vent. 71. See alſo 2. Show. 162, *notis*. Salk. 655. Ld. Ray. 752, 3. Burr. 1423. 5. Burr. 2827.

Caſe 104.

Wilkinſon *againſt* Meyer.

Where the covenants are mutual, a requeſt to perform them is not neceſſary.

S. C. poſt. 232. but ſeems not to be S. P.
S. C. 1. Stra. 585.
S. C. 2. Ld. Ray. 1350.

COVENANT upon an agreement in writing for *South Sea* ſtock, wherein the plaintiff covenanted by indenture to transfer the ſtock before the twenty-fifth day of *March*, or within four days after; and the defendant covenanted to accept the ſame, and to pay ſo much money for it, *infra tempus prædict.* which he had not paid.

The defendant demurred to the declaration.

IT WAS INSISTED *for the defendant*, that here was an indefinite time ſet forth for the performance of this covenant, therefore the plaintiff ought to have ſet forth a requeſt to perform it, otherwiſe he cannot be entitled to this action.

THE COURT. This is a mutual covenant, and in ſuch caſe the plaintiff may maintain his action without laying any requeſt made by him to the defendant to perform it, or that he on his part was ready, and offered to perform it; for the time is not indefinite, as has been ſuggeſted, becauſe the defendant was to accept the ſtock, and pay the money *infra tempus prædict.* which muſt be within the four days; and therefore there is no occaſion to aver a requeſt in this declaration: this caſe is the ſame with that of *Blackwell v. Naſh (a)*, only in that caſe one day was appointed, and here are four days.

Judgment for the plaintiff.

(a) Ante, 105.

Caſe 105.

Woolley *againſt* Briſcoe.

Tueſday 18 *June* 1723.

Where the iſſue is immaterial and where the defendant ſhall not take advantage of a bad replication.

S. C. 1. Stra. 554.

BY the ſtatute 7. *Geo.* 1. c. 1. it is enacted, "that every contract for ſale, or purchaſe of ſubſcriptions, or ſtock of the *South Sea* Company, which ſhall be unperformed, or ſhall not be compounded between the parties thereto, by the twenty-ninth of *September* 1721, or an abſtract or memorial thereof ſigned by the party intereſted therein, and who ſhall be entitled to take advantage of the ſame, ſhall be entered in books kept for that purpoſe by the Company, to whoſe capital ſuch ſtock doth relate, at ſome time before the firſt of *November* 1721, and in default of ſuch entry, every ſuch contract (as to ſo much thereof as ſhall remain unperformed, or not compounded by the twenty-ninth of *September* 1721) ſhall be void."

*[174] * The plaintiff brought an action againſt the defendant, to whom he (the plaintiff) had ſold ſome *South Sea* ſtock, and entitled himſelf to the action, by averring that he tendered the ſtock at the day and place agreed on, but that the defendant did not accept the ſame, or pay the money.

The

The defendant pleaded, that the contract for the ſale of the ſaid ſtock was not entered in the Company's books, at any time before the firſt day of *November* 1720, *ſecundum formam ſtatuti*, ſo that the ſaid contract was void. WOOLLEY *againſt* BRISCOE.

The plaintiff replied, that the ſaid contract was entered, &c. before the firſt day of *November* 1720, *ſecundum formam ſtatuti*, upon which they were at iſſue, and the plaintiff had a verdict.

IT WAS MOVED *in arreſt of judgment*, that this was an *immaterial iſſue*, for there is no affirmative and negative, and conſequently there ought to be *a repleader*.

TO WHICH *it was anſwered*, that the ſubſtance of this replication is, that the contract was entered *ſecundum formam ſtatuti*: it is true, the day and year are mentioned, but that ſhall be rejected as ſurpluſage.

THE COURT. A plea alledging that the contract was not regiſtered *ſecundum formam ſtatuti*, would be ſufficient; and if ſo, the day may be here rejected, eſpecially being immaterial, and not purſuant to the directions of the act. This ſeems a reaſonable conſtruction of this pleading, eſpecially ſince there has been a verdict for the plaintiff on the ſubſtance: the declaration is a good declaration, and ſo is the plea in ſubſtance though not in form; and for want of form in his own plea the defendant ſhall never take advantage by repleader. Dougl. 94.

Judgment for the plaintiff.

The King *againſt* Ford.

Caſe 106.

An indictment for ſelling ale without *any licence whatever*, and againſt the ſtatutes 3. *Car.* 1. c. 3. is good, without averring that he was not licenſed according to 5. & 6. *Edw.* 6. c. 25.

THE DEFENDANT was convicted upon the ſtatute 3. *Car.* 1. c. 3. by which it is enacted, "that none ſhall keep *an alehouſe* "without licence, on paln of forfeiture of twenty ſhillings to the "poor, &c."

IT WAS MOVED to quaſh this conviction, becauſe alehouſe-keepers ſelling ale without licence are puniſhable by former ſtatutes, particularly by the ſtatute 5. & 6. *Edw.* 6. c. 25. which enacts, "that none ſhall keep alehouſes without a licence granted, either "in ſeſſions, or by two juſtices *(quorum unus)* on pain of three "days impriſonment, without bail" * Now it does not appear in this caſe, but that the defendant might be licenſed by two juſtices of peace according to that ſtatute; and if ſo, then this conviction ought to be quaſhed.

* [175]

S. C. 1. Stra. 555. S. C. 2. Seſſ. Caſes, 264. 1. Term Rep. 322.

THE COURT. The ſtatute 5. & 6. *Edw.* 6. c. 25. is entirely out of the caſe, becauſe it is alledged in the indictment, that the defendant ſold ale "contrary to the ſtatute 3. *Car.* 1. c. 3." and it being likewiſe averred, that he ſold it *ſine aliquâ licentiâ quâcunque*, the objection that he might be licenſed by two juſtices is of no weight.

Caſe 107.

The King *againſt* Aſhton.

A ſummary conviction on the 1. *Geo* 1. c. 48. for deſtroying fruit-trees, muſt ſtate judgment of forfeiture, and the particular puniſhment preſcribed by the ſtatute, for if it only ſay *quod convictus eſt*, it is erroneous.

S. C. 1. Seſſ. Caſes, 346. 1. Salk. 378. 383. Stra. 858.

THE WIFE of *Aſhton* was convicted by two juſtices upon the ſtatute 1. *Geo.* 1. c. 48. for deſtroying fruit-trees, the puniſhment for which offence is, to be ſent to the houſe of correction for three months, and to be publickly whipped once in every month during that time.

IT WAS MOVED *to quaſh this conviction*,

FIRST, Becauſe it did not ſpecify the puniſhment inflicted by that ſtatute; for that being a particular puniſhment, *viz.* "to be "ſent to the houſe of correction for three months, &c." ought to be ſet forth in the conviction ſpecially, ſince this offence is to be heard and finally determined by the juſtices.

SECONDLY, It is only a conviction of the offence, *ideo conſideratum eſt per nos quod convictus eſt.*

WEARG, *contra*. FIRST, There are two diſtinct puniſhments inflicted by the ſtatute according to the circumſtances of the caſe; for if the offence be committed where there is a HOUSE OF CORRECTION, the offender is to be impriſoned for three months; and if none, then for four months in THE COMMON GAOL, ſo that the authorities to convict and to commit are diſtinct.

SECONDLY, No judgment is neceſſary; for it has been held that a wrong judgment, or an erroneous diſtribution of a penalty, will not vitiate a conviction.

THE COURT ſeemed clear to quaſh the conviction, for there ought always to be a judgment, "*quod forisfaciat*," or "*quod* "*committatur*," for the act gives no pecuniary forfeiture (*a*).

(*a*) In the caſe of Rex *v.* Hawkes, a conviction for killing deer was quaſhed becauſe it was only *convictus eſt*, without any judgment *quod forisfaciat*, 2. Stra. 858. The ſame point was alſo adjudged in Rex *v.* Vipont, and alſo that where the ſtatute does not fix the duration of the puniſhment, but leaves the time of impriſonment quite diſcretionary, *viz.* "for "any time not exceeding three months," the duration of the commitment muſt be aſcertained upon the conviction, 2. Burr. Rep. 1166. *See* alſo Reg. *v.* Barret, Salk. 383. Rex *v.* Abraham, Cowp. 60. Rex *v.* Dimpſey, 2. Term Rep. 96.

Caſe 108.

* Cooke *againſt* Wingfeild.

After ſentence in the ſpiritual court for defamatory words, the Court will not grant a prohibition on a ſuggeſtion that by cuſtom they were only cognizable in *London*.—S. C. 1. Stra. 555. S. C. Fort. 347. S. C. And. 300. Ante, 115. Poſt. 194. B. R. H. 317. Bunb. 312. 1. Com. Dig. "Admiralty" (E. 9.): 6. Com. Dig. "Prohibition" (D.) (G. 14.).

A LIBEL was exhibited againſt the defendant for defamatory words ſpoken by him in *London*, and after ſentence he moved for *a prohibition*, and obtained a rule, that the plaintiff ſhould ſhew cauſe, &c. why *a prohibition* ſhould not go.

The cauſe now ſhewn was, that it ought to appear on the face of *the libel*, that the matter is not of ſpiritual conuſance; other-

wiſe

wise that court shall not be prohibited, especially after sentence; but no such thing appears on this libel, for the defendant only suggests *a custom* in *London*, that defamatory words spoken there are actionable, which ought not to be suggested, nor any thing offered in proof which is out of the libel, especially since the defendant has submitted so far to the jurisdiction of the spiritual court until sentence was given against him. If there had been any such custom, he ought to have pleaded *in bar* to the jurisdiction of that court, for the courts at *Westminster* are not *ex officio* to take judicial notice, that there is any such custom in *London*.

COOKE *against* WINGFIELD.

THE COURT. There is a difference between a motion of this kind before and after sentence in the spiritual court; for in the one case this custom need not be proved by affidavit, because it is sufficiently known (*a*), but a judicial notice shall never be taken of it after sentence.

So the rule was discharged (*b*).

(*a*) But see Staunton *v.* Jones, Dougl. 380, *notis.*

(*b*) See Argyle *v.* Hunt, 1. Stra. 187. Fort. 347.

Huxser *against* Gapan. Case 109.

TROVER for *a ring*. The defendant moved for leave to bring it into court, and that it might be struck out of the declaration.

Amendment of a declaration in trover.

THE COURT. This is an action for damages founded on a supposed conversion: the motion must be denied; but if it had been an action of detinue, it would have been granted.

Salk. 597.

THE PLAINTIFF then moved for leave to amend his declaration, and add more counts to it, having only declared for fifteen shillings damages, and this was to give the Court jurisdiction; * and though this was strongly opposed on the other side, he had leave to amend.

* [177]

PER CURIAM. In trover the conversion is the point in issue (*a*), for which the time and place should certainly be alledged.

(*a*) Hubbard's Case, Cro. Eliz. 79. Stransham's Case, Cro. Eliz. 98. See Preston *v.* Tooley, Cro. Eliz. 74. also Bull. N. P. 46.

The King *against* Erbury. Case 110.

MR. ERBURY being apprehended by virtue of a warrant from THE SECRETARY OF STATE, for being the author of a *seditious libel*, was bailed to appear in the court of king's bench the first day of *Easter Term* last, and he appeared accordingly.

A person outlawed on an indictment for a libel found at sessions and removed into the king's bench, may be bailed upon shewing probable cause of error, although no writ of error be actually allowed; for in such case he need not, by 4. & 5. *Will. & Mary*, c. 18. assign error in person, and THE WRIT is *ex debito justitiæ*.—Fort. 37.

THE KING against FREBURY.

THE ATTORNEY-GENERAL moved, that he might be committed, becauſe he was outlawed upon an indictment at *Hicks's Hall*, for being the author of a ſeditious libel, entitled, "*The Clemency of the Kings of England*," and thereupon he was committed.

The indictment, together with the outlawry, were removed hither by *certiorari*.

Upon another day being brought up by *habeas corpus*, he moved by his Counſel to be bailed, upon ſtatute 4. & 5. *Will. & Mary*, c. 18. in order to proſecute *a writ of error*, for the reverſal of the outlawry.

THE ATTORNEY-GENERAL oppoſed this motion, for that he was not entitled to ſo much favour *ex debito juſtitiæ*, before he had brought a writ of error to reverſe the outlawry.

The defendant then produced ſome affidavits to ſhew that he had done all in his power to have a writ of error allowed, and that he had applied to the ſecretary's office for that purpoſe.

THE ATTORNEY-GENERAL anſwered, that if the Doctor had made any application to him, he would have ſigned a *fiat* at any time, which he having neglected to do, ſuch neglect ought not to be any excuſe to him (*a*).

PRATT, *Chief Juſtice*, was of opinion, that his outlawry was a confeſſion of his crime, and equal to a conviction; and therefore if he had brought a writ of error, the Court might have refuſed to bail him. He denied it to be within the act.

But POWYS, *Juſtice*, ſeemed to think that it was within it.

EYRE, *Juſtice*, at firſt took it not to be within the act; but he afterwards declared himſelf of opinion that it was within the letter and meaning: he ſaid, the general recital to the ſtatute ſeems to extend only to outlawries proſecuted in the court of king's bench. But the title of the act is general, "For preventing ma-"licious informations in the court of king's bench, and for the more eaſy reverſal of outlawries in the ſame court." And the introduction to the particular clauſe of this act is alſo general, "For

(*a*) It is ſaid, S. C. Forteſcue, 37. that the defendant, after having given notice to the Attorney-General, had moved in Eaſter Term for a writ of error, and that the Attorney-General oppoſed the granting of it, becauſe in crown caſes it was not to be allowed without a *ſign manual* from the king; and formerly it was certainly underſtood, that writs of error in all criminal caſes were not grantable *ex delito juſtitiæ* but *ex gratiâ regis*, Crawle *v.* Crawle, 1. Vern. 170. Rioters Caſe, 1. Vern. 175. but it was agreed in the third of *Queen Anne*, that in *miſdemeanors* it ought to be granted as a matter of right, Reg. *v.* Paty, 2. Salk. 504. where there is probable cauſe of error, 4. Burr. 2550. and therefore even in miſdemeanors it cannot now iſſue without the *fiat* of the Attorney-General, who is to examine whether it is ſought for delay or on probable error, and if there be, the court of king's bench will order him to grant his *fiat*, 4. Burr. 2551. But in treaſon or felony, if the error be ever ſo manifeſt, the defendant cannot have a writ of error without a *ſign manual* for that purpoſe, 4. Burr. 2551.

"the

" the more eaſy and ſpeedy reverſal of outlawries in the ſaid court;" and ſo is the enacting clauſe, " that no perſon who ſhall be out-" lawed in the ſaid court for any cauſe, matter or thing whatſoever " (treaſon and felony only excepted), ſhall be compelled to come " in perſon in or appear in perſon in the ſaid court to reverſe " ſuch outlawry; but may appear by attorney and reverſe the " ſame, without bail, in all caſes except where ſpecial bail ſhall " be ordered by the ſaid court." Now without queſtion an outlawry at the ſeſſions removed into this court by *certiorari* is an outlawry in this court, and conſequently is within the letter of the act: and as it is within the letter, ſo it is within the reaſon of the law; for there can be no reaſonable difference between an outlawry originally proſecuted in this court, and an outlawry removed hither by *certiorari*. Beſides, by a ſubſequent clauſe of the act the ſheriff who arreſts the defendant on a *capias utlagatum* may take an appearance or ſpecial bail, where ſpecial bail is required in the action: and if the ſheriff has power to bail the defendant in any caſe, without doubt this Court has the like power; and it would be very hard if it ſhould be otherwiſe; for this man ought not always to be impriſoned for a miſdemeanor or a contempt, the outlawry being no more than a contempt of the law, and a means to compel him to anſwer; and as yet he is under * no conviction; and the bail he is to give is only to proſecute his writ of error with effect. * [178]

FORTESCUE, *Juſtice*, was ſtrongly of the ſame opinion.

PRATT, *Chief Juſtice*, then deſired the Counſel for the defendant to ſhew ſome colourable error to reverſe this outlawry, ſo that it may appear to the Court it is not for delay, and to avoid juſtice.

THE COUNSEL replied, that they intended to follow the common practice, as in caſes of this nature, and that they would aſſign errors in fact, which probably might be confeſſed by THE ATTORNEY-GENERAL, upon giving bail to anſwer the trial of the merits upon this information.

And thereupon the ſolicitor for the defendant exhibited a petition to THE ATTORNEY-GENERAL for a writ of error, who ſigned a *fiat* in court.

And then his Counſel ſaid, that they would take out the writ the next ſeal-day, and that this being the laſt day of the Term, it would be hard to continue him in cuſtody all the Vacation, eſpecially when it appeared to the Court, that the writ of error was proſecuted for his diſcharge.

THE COURT, The defendant not having bail ready in court, may be bailed at a Judge's chambers, ſhewing ſome error.

[Case 111.

Harriſon *againſt* Green (*a*).

"*Non aſſumpſit*" is a good plea to an action brought againſt *a common carrier*.

ACTION ON THE CASE againſt *a common carrier* for detaining the plaintiff's goods until they were ſpoiled.

Upon *non aſſumpſit* pleaded, the plaintiff had a verdict.

Cro. El. 470. pl. 29. Noy Rep. 56. Lev. Rep. 142. Brownl. 8. Al. 77. Com. Rep 10. Comb 379, 380. Carth. 371. Ld. Raym. 99. Sid. 236. pl. 3. 2. Barnes, 252, 253.

IT WAS MOVED *in arreſt of judgment*, that the iſſue and plea are improper; for *non aſſumpſit* is no plea to an action founded on *a tort*.

THE COURT. This action is founded on the general cuſtom of the realm, and on that *aſſumpſit* which is implied by law on the carrier's receiving the goods; for by his receipt of the goods he implicitly undertakes to keep and deliver them ſafe; and *non aſſumpſit* is a proper plea, and the iſſue is proper enough.

And by PRATT, *Chief Juſtice*, and EYRE, *Juſtice*, judgment was given for the plaintiff.

(*a*) This caſe was determined in Michaelmas Term, in the 10. *Geo.* 1. 1723.—NOTE *to former edition.*

*[179]

Caſe 112.

* The King *againſt* Thorogood.

If a perſon who has made an affidavit in the court of common pleas, appear on ſummons, and confeſs it to be falſe, the Court may record the confeſſion, and order him to be put in the pillory for perjury.

THE DEFENDANT having made an affidavit in the court of common pleas, and the truth thereof being controverted, he was ſummoned to appear in court, and accordingly did appear in *Eaſter Term* laſt, and *confeſſed* that he had made the affidavit, and that it was falſe. Whereupon that Court recorded his confeſſion, and ordered that he ſhould be taken into cuſtody, and put in THE PILLORY for perjury (*a*).

IT WAS NOW INSISTED *by his Counſel*, that this could not be done upon his own *confeſſion*, becauſe it is not *a conviction*, but only *matter of evidence*, for he ought judicially to be brought before the Court by indictment, and therefore his *confeſſion* ought not to have been recorded. Beſides, the court of common pleas has no juriſdiction in criminal caſes, and therefore if it had appeared on record, that the defendant was perjured, that Court could not have puniſhed him.

ON THE OTHER SIDE—To argue that a criminal ſhall not be convicted upon his *own confeſſion*, is not only a new, but a very ſtrange doctrine, becauſe the confeſſion of a crime is the ſtrongeſt proof of guilt. It is likewiſe very ſtrange to object that the court of common pleas has no juriſdiction in this caſe, becauſe the puniſhment by PILLORY is by virtue of the ſtatute 5. *Eliz.* c. 9.

(*a*) See Rex v. Middleton, Fort. 201. On a motion for attachment, the defendant came voluntarily into court and confeſſed that he was the author of a libel, and the confeſſion being recorded, he was thereupon fined fifty pounds and ordered to find ſureties for his good behaviour. See alſo Mathias Carter's Caſe, poſt. 341.

and

and the Court having given a ſentence accordingly, ſhews, that they proceeded on that ſtatute, by which power is given to any court where the perjury is committed, to puniſh the offender; ſo that it is plain that court has a juriſdiction, eſpecially ſince it is provided by that very ſtatute, that it ſhall not extend to any eccleſiaſtical court; which being a negative pregnant, is a full proof that all other the king's courts may puniſh ſuch offenders, and even thoſe who ſhall be convicted by their own confeſſion; for the ſtatute gives power to "hear and determine by inquiſition, information, bill, preſentment, *or otherwiſe*, and to give judgment "and award execution, &c." now by the word "otherwiſe," the confeſſion of the party may be intended. Beſides, if that court cannot puniſh the defendant by virtue of the ſtatute 5. *Eliz.* c. 9. he might be puniſhed at common law, for perjury is an offence at common law, and * any court may puniſh ſuch a criminal for an offence committed *in facie curiæ*; which was the better opinion in *Buſhel's Caſe (a)*, though the *Chief Juſtice* VAUGHAN doubted it.

THE KING *againſt* THOROGOOD.

Lev. 155.

*[180]

But notwithſtanding what was ſaid by the defendant's Counſel, he was put in THE PILLORY the laſt day of the Term.

(a) Vaugh. 152.

The King *againſt* Powell and Others.

Caſe 113.

MOTION was made in this cauſe for leave to plead double: FIRST, To juſtify under the corporation, as a corporation by *preſcription*; and, SECONDLY, as a corporation by virtue of the *charter* of *Philip and Mary*.

Double pleas denied.

See ante, 158.

THE COURT. The pleas are inconſiſtent; for after acceptance of a charter, the corporation can never be eſteemed a corporation by preſcription.

TRINITY

TRINITY TERM,

The Ninth of George the Firſt,

ON

A Trial at Bar,

BEFORE

The Court of King's Bench,

Hiliard *againſt* Phaly and Others.

Caſe 114.

A TRIAL AT BAR on an iſſue directed out of the court of chancery.

To prove that a woman was married antecedent to the birth of her child, cohabitation, reputation, and other circumſtances, may be given in evidence; but an anſwer given in chancery by the mother reſpecting this fact, is not, admiſſible during her life, for ſhe may be examined to it *vivâ voce*; nor are proceedings in the ſpiritual court admiſſible.

B. R. H. 79. 1. Wilſ. 340.

The queſtion was, Whether *Mr. Hiliard*, the plaintiff's brother, who was ſeiſed in fee of the lands in queſtion, of the yearly value of ſix hundred pounds, was married to *Sarah Phaly*, the mother and guardian of the defendant, before ſuch a day, which was his birth-day? There were three other iſſues to the ſame purpoſe, ſhe having three other ſons.

The defendant (the infant) by his mother and guardian pleaded, that the ſaid *Mr. Hiliard* was married to her before the birth of any of the defendants.

Upon which plea they were at iſſue; ſo that, the plea being in the affirmative, the proof was upon the defendants, which was as follows:

IT WAS SAID *by their Counſel*, that this plea being in favour of legitimation, in ſuch caſe cohabitation has always been allowed to be good evidence *(a)*.

It was in proof, that *Mr. Hiliard* cohabited with this woman above twenty years; that in ſuch a year, &c. he came with her out of *Lincolnſhire* to *London*, and lodged in *Wild ſtreet*, where they were married by a prieſt who ſerved the *Portugal* ambaſſador; and it was proved, that ſuch a prieſt was about that time

(*a*) See May *v.* May, Bull. N. P. 112. St. Peter's, Worceſter, *v.* Old Swinford, Burr. S. C. 23.

chaplain

HILIARD *againſt* PHALY AND OTHERS.

chaplain to the ambaſſador. That *Mr. Hiliard* was a *Roman catholick*, and for that reaſon there was no body preſent at the marriage, or who could prove that ſhe was actually married, beſides herſelf (*a*); but there was ſufficient evidence, that he acknowledged ſhe was his wife, and deſired the witneſſes to uſe her as ſuch; and that on the day of his death, and but a few hours before he died, he declared in the preſence of his phyſician and ſeveral others (who were now produced as witneſſes) that he was married to her.

ON THE OTHER SIDE it was admitted, that this is a favourable iſſue, becauſe it was to ſupport legitimation; but it is to be favoured only where the matter is doubtful to the Court and to the jury, and not where there is ſuch clear proof to the contrary, that there can be no room to doubt.

*[181] * The proof was, that *Mr. Hiliard* took this woman long ſince to be his houſe-keeper; that ſoon afterwards ſhe was with child, and that both of them went to *London* to avoid proſecution in the ſpiritual court; but yet after the birth of three of theſe children, he was proſecuted ~~in that court for fornication~~ with this woman, and that ſentence was given againſt him, and penance enjoined, and that he actually paid the commutation money; that he ordered his ſervants not to call her miſtreſs, but by her proper name, and that he frequently told his neighbours, and ſome of his moſt intimate acquaintance, that he was never married to this woman: Then THE PARSON of the pariſh depoſed, that he knew this woman ever ſince ſhe firſt became a ſervant to *Mr. Hiliard*, and that he always took her to be his concubine, and not his wife.

But to obviate the parſon's evidence, there was a letter produced under his hand in very endearing words and expreſſions, wherein he aſſured her, that if ſhe would marry him, then he would aſſiſt her to baffle all the attempts of her enemies to diſprove her marriage with *Mr. Hiliard*; and being aſked by THE CHIEF JUSTICE what could induce him to write ſuch a letter, if he took her to be a ſervant and a concubine; the parſon anſwered, that greater men than he had married ſervants (*b*).

It was farther proved on *the plaintiff's* ſide, that upon the death of *Mr. Hiliard* this woman got into her cuſtody all the writings concerning the inheritance of theſe lands; and upon a bill in chancery exhibited againſt her to diſcover the ſame, ſhe anſwered, that ſhe was married to *Mr. Hiliard* about three years before he died, and ſo inſiſted to keep the writings.

(*a*) In Lord Valentia's Caſe, adjudged in the Houſe of Lords, 22 April 1771, where the queſtion was, Whether the Earl of Angleſea was married to the Counteſs Dowager of Angleſea on the 15 September 1741, prior to the birth of Lord Valentia, their ſon, who was born in the year 1744; the Counteſs Dowager having no intereſt was admitted a witneſs to prove the fact of the marriage. Cited by LORD MANSFIELD in the caſe of Goodright *v.* Moſs, Cowp. 593. See alſo Stapleton *v.* Stapleton, 1. Atk. 4.

(*b*) Lord Chief Juſtice Pratt, who aſked him the queſtion, married his maid ſervant, which the parſon, it is ſuppoſed, hinted at.—NOTE *to the former editions.*

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This anſwer was now offered to be given in evidence.

But it was oppoſed on the other ſide; for though it might be concluſive againſt herſelf, if ſhe pretended to any dower, or to a jointure, yet it cannot be given in evidence againſt a third perſon not deriving any title under her.

And THE COURT being of that opinion, the anſwer was not read.

Then they offered to give the proceedings in the ſpiritual court in evidence.

But that was likewiſe denied, becauſe what was done in the ſpiritual court cannot be evidence at common law where the title of lands is in queſtion.

So the jury gave a verdict for the defendants.

* But THE LORD CHANCELLOR thought it hard that ſuch evidence had been rejected; for as to the anſwer in chancery, he ſaid, that it was plain, where there is any confidence or truſt between the parties, the confeſſion of one in an anſwer, &c. might be given in evidence againſt the other, though it might be a queſtion whether ſuch evidence was concluſive, or not (*a*). * [182]

Then as to the proceedings in the ſpiritual court, admitting there had been a marriage in this caſe, and they had afterwards been divorced for conſanguinity or affinity, ſuch ſentence of divorce would have been concluſive evidence to baſtardiſe the children born in wedlock before the divorce; and what could be better evidence in a court of law to ſhew there was no marriage, than a ſentence in the ſpiritual court carried on in a regular ſuit, and pronounced in the life-time of the parties, that they were guilty of fornication, and the proof of the commutation-money paid by the ſuppoſed father.

(*a*) See the caſe of Goodright v. Moſs, where it is decided that *general declarations*, or the *anſwer* of a parent in chancery, are good evidence, after the death of ſuch parent, to prove that a child was born *before marriage*, but not to prove that a child born *in wedlock* is a *baſtard*, Cowp. 591.

MICHAELMAS TERM,

The Tenth of George the Firſt,

IN

The King's Bench.

1723.

Sir John Pratt, *Knt. Chief Juſtice.*
Sir Lyttleton Powys, *Knt.*
Sir Robert Eyre, *Knt.* } *Juſtices.*
Sir John Forteſcue Aland, *Knt.*
Sir Robert Raymond, *Knt. Attorney General.*
Sir Philip Yorke, *Knt. Solicitor General.*

* The Caſe of the Dean of Trinity-Chapel in Dublin *againſt* The Archbiſhop of Dublin. Caſe 115.

UPON A WRIT OF ERROR brought in the king's bench in *Ireland*, on a judgment given in the common pleas there,

Where the ordinary is viſitor of a royal foundation.

THE CASE was thus: The *archbiſhop of Dublin* libelled in the ſpiritual court there againſt the *dean and chapter of Trinity-Chapel* there, for denying to admit him to viſit them. The defendants ſuggeſted for *a prohibition*, that the ſaid chapel was of royal foundation, being firſt A MONASTERY of royal foundation, and afterwards tranſlated into a deanery and chapter, and being a donative was exempted from the viſitation of the ordinary. And thereupon a prohibition was granted, and that the plaintiff ſhould declare upon it, which he did, ſetting forth, that this chapel was of royal foundation, and that the ordinary had no viſitatorial power there but what he had by virtue of the letters patent of creation made by *Henry the Eighth*, in the thirty-third year of his reign, by which it is expreſsly provided, that *the Archbiſhop* ſhall have no power or control over *the deanery* but ſuch as he had over THE PRIOR AND CONVENT of *the Holy Trinity* time out of mind, which priory was of

Stra. 536. Forteſc. Rep. 329. 9. Viner, 475. 2. Bro. Caſes in P. 554.

THE CASE OF THE DEAN OF TRINITY-CHAPEL IN DUBLIN *againſt* THE ARCHBISHOP OF DUBLIN.

of royal foundation, and had time out of mind been viſited by the king or his chancellor. The defendant, *the Archbiſhop*, having craved *oyer* of the letters patent of *Henry the Eighth*, pleaded, that *the king* did farther order and declare therein, that the church of *the Holy Trinity* * ſhould be the archiepiſcopal ſeat of *Dublin*, as it was before, and as it uſed to be; and that the archbiſhop ſhould exerciſe no juriſdiction there but ſuch as he uſed when it was A PRIORY; and that time out of mind the ſaid *archbiſhop*, and his predeceſſors, archbiſhops of *Dublin*, kept their cathedrals in this church, and that the PRIOR AND CONVENT before, and the DEAN AND CHAPTER ſince the tranſlation, were the chapter of the ſaid archbiſhops, and time out of mind had been viſited by them as occaſion required, and traverſed, that the priory was of royal foundation. The plaintiff demurred ſpecially, and after argument, *the Archbiſhop* (the defendant) had judgment for *a conſultation*, which judgment was affirmed upon a writ of error in the king's bench in *Ireland*.

And that judgment being about to be confirmed likewiſe in the king's bench here, ſome objections were made as follow:

FIRST, This writ of error was a judgment "*coram juſticiariis* "*noſtris de communi banco Hiberniæ*;" whereas the action was commenced in that court in the queen's reign.

And thereupon this court was of opinion, that the record was not well removed; ſo that writ of error was abated, and a new writ was afterwards brought in this court.

SECONDLY, It was objected, that the writ of error in *Ireland*, by which the cauſe was removed from the common pleas to the king's bench there, was not good, becauſe it was directed, "JOHANNI FOSTER, *Armig.*" omitting "*capitali juſticiario de* "*communi banco.*"

And this being apprehended to be a fault, and not to be maintained, the defendant in error, upon diminution alledged, got a *certiorari* to the Chief Juſtice of the king's bench in *Ireland* to certify the record as it ſtood before him in that court, but he certified the record to be right; ſo that this appearing to be the miſtake of the clerk only, it was now moved, that it might be amended; and accordingly it was amended.

THIRDLY, It was objected, that this writ of error was of an error *in redditione judicii loquelæ quæ fuit in curiâ Annæ reginæ*; when the judgment was given in the common pleas in *Ireland* in the firſt year of the reign of king *George the Firſt*.

To which it was anſwered, that the *loquela* began in the reign of the queen, and the word "*quæ*" being a relative ſhall refer to that court of the queen.

FOURTHLY, The next objection was, that the writ of error to remove the record into the king's bench in *England* was returnable

able on ſuch a day, and that the archbiſhop did not * appear within five Terms afterwards, ſo that the cauſe was diſcontinued.

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To which it was anſwered, that the defendant in error may come in at any time; nay, he need not come in at all until the plaintiff aſſign errors. It is true, he may come in if he pleaſes, and bring a *ſcire facias* to compel the plaintiff to aſſign errors; but this is at his election; which THE COURT agreed.

THE COURT afterwards affirmed the judgment of the king's bench in *Ireland*.

A WRIT OF ERROR was thereupon brought in THE HOUSE OF PEERS, and there this cauſe was argued upon the merits.

THE CASE, as it ſtands upon the pleadings, is thus: The *archbiſhop of Dublin* propoſed a viſitation of this deanery, as he was ordinary of the place; and the plaintiff in the prohibition not attending, he was proſecuted by *the Archbiſhop* in the ſpiritual court there, and thereupon the plaintiff moved for *a prohibition*, and had it, upon a ſuggeſtion, that this chapel was of royal foundation, and therefore exempted from any viſitatorial power of the ordinary.

IT WAS ARGUED *for the dean*, that it was to be viſited only by THE KING or his *chancellor*, but not by *the ordinary*, becauſe it was a royal foundation; that when this was created a deanery by the letters patent of the thirty third year of *Henry the Eighth*, it was provided by the letters patent of creation, that *the Archbiſhop* ſhould have no power over THE DEANERY, other than what he had before over THE PRIORY; therefore if he had any right, he ought to have pleaded it, and to have ſet forth what power he had over THE PRIORY; otherwiſe his plea is immaterial.

ON THE OTHER SIDE *it was argued*, that this being an eccleſiaſtical corporation is by common intendment ſubject to the viſitation of the ordinary of the place, unleſs by the letters patent of creation there had been a viſitor appointed by the founder; for all ſuch corporations are *primâ facie* ſubject to the juriſdiction of the ordinary, though they were founded by the crown; and ſo is *Corbett's Caſe*, in *Dyer* 273.

The only material point is, Whether this was a royal foundation, or not, which was not the point in the caſe of this *Archbiſhop* and *Dr. Harriſon* ſome years paſt, who was a prebend of this church; for if the priory was not of royal foundation, the deanery into which it was tranſlated by letters patent cannot be ſo; but if it was of royal foundation, then the tranſlation into dean and chapter * is no prejudice to the founder, for he remains * [186] founder ſtill, for nothing is altered but the monaſtic rule and habit; and ſo it was held in the *(a) Dean and Chapter of Nor-*

(a) 3. Rep. 73.

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wich's Caſe, in the thirtieth year of *Henry the Eighth*; in which year, and by that king, the priory and convent of the cathedral church of the *Holy Trinity of Norwich* was tranſlated into the dean and chapter.

Therefore if nothing is altered by the tranſlation, then by conſequence the founder is not deprived of his right of patronage, neither is the viſitor deprived of his right of viſitation, becauſe it is ſtill the ſame body corporate, though by another name.

The judgment was affirmed.

Caſe 116.

The King *againſt* The Mayor of Tiverton.

An information lies againſt the mayor of a corporation for abſenting himſelf on the charter day of election, and thereby preventing the election of a ſucceſſor.
Poſt. 245.

Strange, 593. 2. Ld. Ray. 1377. 5. Burr. 2494. 3. Bac. Abr. 251.

UPON A MOTION for AN INFORMATION againſt the defendant for bribery, at an election of a new mayor for the corporation of *Tiverton*, in *Devonſhire*; who when he found he could not ſucceed in the choice of the defendant (the old mayor) withdrew himſelf on the day of election, ſo that a new mayor could not be choſen, though the common-council did all in their power to proceed to an election, by appearing on the ſtairs in the town-hall for that purpoſe, but the door was locked by the defendant (the old mayor), and a book belonging to the corporation was taken away; ſo that for want of chooſing a mayor on the day of election the corporation was diſſolved.

THE CHIEF JUSTICE, who was formerly recorder of this corporation, ſaid, that there was a difference amongſt the members thereof about precedency; ſo the rule was made to ſhew cauſe why an information ſhould not go.

Bribery is a good cauſe to remove a corporator from his office.

Afterwards, in *Hilary Term*, it appeared, that there was bribery on both ſides; ſo informations were filed againſt both parties; and the Court agreed, that bribery was a ſufficient cauſe to remove a man from his office, and that it was an offence by which the very conſtitution of the Government might be altered.

* [187]

Caſe 117.

* Anonymous.

If a penal ſtatute direct proceeding by *information* or *indictment*, and the grand jury has found an *indictment*, the Court will not file an *information*, although the *indictment* is quaſhed.

A MOTION for an information againſt the defendant, upon an affidavit of the proſecutor, that he had loſt fifteen pounds, or thereabout, to the defendant, at one ſitting.

The words of the ſtatute 9. *Anne*, c. 14. are, "Any perſon "winning at one time above the value of ten pounds, and being "convicted thereof upon an information or indictment ſhall forfeit "five times the value, &c."

THE COUNSEL *on the other ſide* objected, that the proſecutor had already *indicted* the defendant for the ſame offence, and that THE GRAND JURY had found the bill.

This

This was true; but the defendant was not tried upon it, becauſe it was quaſhed for inſufficiency. ANONYMOUS.

THE COURT, however, would not give the proſecutor leave to file an information, for that THE GRAND JURY had already found a bill; and though the indictment was quaſhed, they might find another bill for the ſaid offence; therefore there was no reaſon for this Court to interpoſe.

Crofts, Executor of Curtis, *againſt* Butel, the Bail of Harris. Caſe 118.

AN ACTION was brought in the court of king's bench, and judgment obtained, and a writ of error brought returnable in the exchequer-chamber. Bail, in what method to be taken.

Two perſons became bail to the writ of error before PRATT, *Chief Juſtice*; to which bail exception being taken, one juſtified himſelf in court, but the other did not; ſo that another additional bail was put in before POWYS, *Juſtice*, at his chambers in *Serjeants'-Inn*, in *Fleet-Street*; on which entry before POWYS, *Juſtice*, the recognizance of bail was drawn up. The judgment being affirmed on the writ of error, two *ſcire facias's* were brought in *London* againſt the bail, and two *nihils* returned; and a *capias ad ſatisfaciendum* againſt the defendant, on which he was taken and impriſoned.

WHITAKER, *Serjeant*, moved to diſcharge the defendant out of execution, and to ſet aſide the proceedings on the *ſcire facias*.

FIRST, The entry of the recognizance is irregular. It ought to have been entered as taken before PRATT, *Chief Juſtice*, when the firſt bail was given. The bail which juſtified is bail from his firſt acknowledgment before the Judge; whereas if the recognizance ſhall be drawn up as entered into when the additional bail was given, he can be bound but from thence; ſo that if between thoſe times he has aliened his lands, ſuch alienation is good and binding.

SECONDLY, The *ſcire facias* is returnable on a day certain, which it ought not to be, the proceeding in the original cauſe being by bill.

THIRDLY, The *capias ad ſatisfaciendum* is irregular, becauſe by the ſtatute 3. *Geo.* 1. c. 15. it is enacted, "that the plaintiff "ſhall mark on the back of the writ the real ſum or debt due to "him, before it is delivered to the ſheriff to be executed;" and here there was no ſum indorſed on the *capias*, nor any time mentioned in the entry of this recognizance; ſo void.

* FOURTHLY, The *ſcire facias* ought to have been brought in *Middleſex*, for the recognizance is filed there. Beſides, the recognizance is a lien on the eſtate of the bail from the day that it was * [188]

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taken, and it may be prejudicial to enter it on a future day, *viz.* on the day that the laſt recognizance was taken, becauſe the perſon who entered into the firſt recognizance might have aliened his lands before the other was taken.

FIFTHLY, No *capias ad ſatisfaciendum* lies upon a recognizance of bail; for the tenor of the recognizance is, that the debt be levied *de bonis, catallis, terris, et tenementis.* The defendant ought to have appeared to this *ſcire facias*, and pleaded this wrong inrolment, and ſhall not now take advantage of it on a motion; but this ſort of practice of taking bail at ſeveral times was ſettled in this court in the time of *Chief Juſtice* PARKER, and is an eaſe to defendants; for the firſt man is bail only *de bene eſſe*, and no bail is really given until the ſecond man enters into the recognizance, for then it is complete, and not before. And the entry of the recognizance muſt be entire as if taken at once; and the conſtant practice is to take the recognizance as if the bail were both taken at the laſt Judge's chambers. The inconvenience which is objected, that the land may be aliened in the mean time, cannot properly be urged by the bail, ſince the only prejudice that can accrue thereby muſt ariſe to the plaintiff.

As to THE SECOND OBJECTION, that the *ſcire facias* is returnable on a day certain, which it ought not to be, the proceedings in the original cauſe being by bill; the return of the *ſcire facias* on a day certain is good, for the proceeding on which this *ſcire facias* is founded is the recognizance, which is an entire diſtinct charge and record from the former action; for that was determined by the judgment, and that record thereby cloſed; but if this proceeding ſhould be adjudged a proceeding by bill, yet it is not any irregularity, but an error.

As to THE FOURTH OBJECTION, the diſtinction is between a recognizance taken by the Court, which is of no force till entered of record at *Weſtminſter*, and then it is entered as taken in court; and a recognizance taken on the ſtatute of 3. *Jac.* c. 8. For by that act a Judge at his chambers may take a recognizance of bail, which is obligatory by the caption, and gives the cognizee power of election to ſue in *London* or *Middleſex*. 2. *Salk.* 600. *pl.* 10. 6. *Mod.* 42. 2. *Ld. Raym.* 1966. 11. *Mod.* 244. If this is an error, it may be taken advantage of by a writ of error upon the judgment on the *ſci. fac.* or on the award of the execution.

As to THE FIFTH OBJECTION, Formerly it was held, that no *capias ad ſatisfaciendum* would lie on a recognizance of bail; but the latter reſolutions have been contrary, and the conſtant practice has been accordingly. *Lev.* 226.

Then as to the not indorſing the ſum on the recognizance, that doth not make the *capias* void. The ſtatute requires it ſhould be done, that an execution ſhould not be taken for more than the real debt, and inflicts a penalty if it ſhould be executed for a greater ſum; it only ſubjects the party to the forfeiture of double damages.

As

As to THE LAST OBJECTION, the anſwer was, that the entry ſhould be in *Middleſex*, and not in *London*, but that is of bail to actions brought in the court of king's bench, and not to original actions upon recognizances, as this is.

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THE COURT. If the ſecond bail had entered into a recognizance before the Chief Juſtice, as the firſt man did, that would not have related to the time of the firſt recognizance given by the other bail, and taken before the ſame Chief Juſtice; but here the ſecond bail entered into a recognizance before another Judge, which makes no alteration of the caſe.

A bond ſigned by one at one day, and by another at another day, ſhall relate to the firſt deliverey.

A Judge may take a recognizance of bail at his chamber, and the entry in his book is a good warrant for the entry of it in the office, and the practice is ſettled to take ſuch recognizance at one time, and another at another time; for the firſt is *de bene eſſe*, and no complete bail is given till the laſt is taken, and from that taking the recognizance is made up; for ſuch Judge before whom the laſt bail is taken ſigns the roll; therefore, though taken by different Judges, the * firſt is of no value till the laſt is taken, for then the bail and the entry is entire and perfect, and not before.

Cro. Eliz. 622, 623.

* [189]

SECONDLY, The return is good and proper; for the *ſcire facias* is not grounded on a proceeding by bill, but on a collateral matter.

THIRDLY, The *capias ad ſatisfaciendum* is good, though it is not indorſed.

FOURTHLY, The *ſcire facias* is well directed to the ſheriff of *London*.

FIFTHLY, The body may be taken in execution on ſuch recognizance.

PER CURIAM. The proceedings are regular.

Wherefore the motion was denied.

Williams *againſt* Lyons.

Caſe 119.

AN ACTION ON THE CASE was brought againſt the defendant for *criminal converſation* with the plaintiff's wife.

An attachment lies for endeavouring to intimidate a plaintiff, for the purpoſe of inducing him to take leſs damages than the jury gave.

Upon *not guilty* pleaded, the cauſe was tried at the Sittings after the Term, and the jury gave a verdict for the plaintiff with two hundred pounds damages.

Afterwards the defendant uſed ſome indirect means with the plaintiff to take a ſmall ſum, and releaſe the damages; and becauſe he would not take thirty pounds, and give ſuch a releaſe, the defendant got a warrant of a juſtice of peace to take the plaintiff for a pretended murder. The warrant was executed on him on a *Sunday*; he was kept in cuſtody till *Monday*; and then was arreſted in an action of five hundred pounds at the ſuit of the defendant; all which was done to extort a releaſe from him.

This appearing plainly to the Court, a rule was made for him, the conſtable, the bailiff, and the juſtice of peace's clerk, to ſhew cauſe why AN ATTACHMENT ſhould not go againſt them.

Caſe 120. Miller *againſt* Bradley.

If a judgment for the plaintiff be affirmed on a writ of error the laſt paper-day of the Term, a *teſtatum capias* may iſſue on the laſt day, returnable the firſt day of the enſuing Term.

A WRIT OF ERROR was brought on a judgment in the common pleas, and the judgment was affirmed in the court of king's bench the laſt paper-day of the laſt Term.

It was contended, that therefore the *capias ad ſatisfaciendum* muſt be returnable in this Term, becauſe the judgment could not be ſigned until the *quarto die poſt*, &c.; if ſo, then the plaintiff having brought a *teſtatum capias ad ſatisfaciendum*, that muſt be irregular, becauſe there could be no *capias ad ſatisfaciendum* on a judgment not ſigned, and by conſequence nothing to ground a *teſtatum capias ad ſatisfaciendum*, eſpecially this action being brought by original.

2. Jones, 200. 1. Salk. 589. 5. Com. Dig. "Proceſs" (E. 4).

E contra. The objection is, that this action being brought by *original*, no *capias ad ſatisfaciendum* could iſſue before the judgment was ſigned; and it being obtained the laſt paper-day of the laſt Term, it could not be ſigned till after the *quarto die poſt*, &c. of this Term; ſo there being nothing to warrant a *capias ad ſatisfaciendum*, by conſequence the *teſtatum capias ad ſatisfaciendum* muſt be irregular. * But when the judgment was ſigned, though in the latter end of the laſt Term, this by relation is a ſufficient foundation to ſue out a *capias* the firſt day of the Term, which will be a warrant to found a *teſtatum* returnable *tres Trinitatis*, and ſo good.

* [190]

TO WHICH *it was anſwered*, that though to ſome purpoſes the Term is but one day in law, yet to other purpoſes it is not ſo; as for inſtance, if there be *continuances*, there can be no judgment before they are entered, and the principal caſe being by original, there could be no judgment entered until the *quarto die poſt* of the following Term; ſo there could be no ſuch judgment as is now ſet up to ground a *teſtatum capias ad ſatisfaciendum* (*a*).

2. Lev. 108. Salk. 626.

THE COURT. This is a judgment of the firſt day of the Term, in which it was obtained by relation, which is ſufficient to ground a *capias ad ſatisfaciendum*, and by conſequence a *teſtatum capias ad ſatisfaciendum*; and if there is no difference between an action *by bill* and *by original*, it is regular. As to the *continuances* being carried on from one Term to another, no ſuch thing appears on the record, ſo this execution is regular. It is true, if the *continuances* had been entered, no execution could be prior to ſuch entry; and ſo is the caſe of *Prince v. Slaughter* (*b*), and *Dobſon v. Bell* (*c*).

(*a*) See Brand *v.* Mears, 3. Term Rep. 388.; and Copperthwaite *v.* Owen, 3. Term Rep. 657.

(*b*) 2. Vent. 104.

(*c*) 2. Lev. 176.

Whitley

Whitley *againſt* Loftus.

Caſe 121.

In an action on a covenant by father and ſon that the ſon ſhall account, the declaration need not ſtate a requeſt to account.

COVENANT on an indenture of apprenticeſhip, wherein the plaintiff covenanted with the father and ſon (the apprentice), and they on the other ſide covenanted with him (the plaintiff); and this action was brought jointly againſt the father and the ſon, for that the ſon had covenanted faithfully to account at his maſter's (the plaintiff's) requeſt, for all ſuch of his maſter's goods as ſhould come to his hands.

The breach aſſigned was, that the defendant (the ſon) had not accounted, &c.; and, upon *non infregerunt conventionem* pleaded, the plaintiff had a verdict.

IT WAS MOVED, *in arreſt of judgment*,

FIRST, That the declaration was ill, becauſe the plaintiff did not ſet forth any *requeſt* made to the ſon to account, which he ought to have done, that the defendant might have an opportunity to traverſe it.

SECONDLY, That the plea is too general, two breaches being aſſigned. Beſides, it is no plea, for one breach is in the negative, that he did not account.

TO WHICH *it was anſwered*, that the breach is laid in this manner, that he did not account, *ratione cujus* he broke his covenant, which is an affirmative. Beſides, this is an exception taken by the defendant to his own plea, and is after a verdict, which cures an informal iſſue.

*THIRDLY, That this being a joint action againſt the father and the ſon, and the breach aſſigned only againſt the ſon, this judgment cannot be maintained. *[191]

THE COURT ſaid, the plea and iſſue are good after a verdict.

FOURTHLY, That the action ought not to be brought againſt the father, for he did not covenant that his ſon ſhould truly account, &c. he only covenanted for himſelf ſeparately, to pay the money which he was to give to the plaintiff for taking his ſon apprentice; and the clauſe in the latter end of theſe articles is in the ſingular number, *viz.* that each of them (the father and ſon) binds himſelf for the true performance thereof; ſo that the father cannot properly be ſaid to be bound for his ſon, but only for himſelf.

Ld. S. P. Doug. 500. Branch v. Lavington.

IT WAS ARGUED *on the other ſide*, that this was a covenant entered into by the maſter on the one part, and by the ſon, with the conſent of his father, on the binding part, but by both father and ſon as to all other purpoſes; for though the ſon be only bound apprentice, yet they both covenant for the true performance of all covenants, &c. the words in the cloſe of the articles being, "that "each of them binds himſelf, &c. for the true performance of

WHITLEY *againſt* LOFTUS.

" all the covenants and agreements therein mentioned " And even from the nature of theſe covenants, the father is always bound for the ſon; for otherwiſe maſters could not rely on the covenants of their ſons, who are commonly under age, and ſo by law not capable to conſider what covenants to make; and conſequently in this caſe the father ſhall be taken to covenant for the performance of his ſon's part as well as his own.

THE COURT was of opinion, that the very end of binding the father was to anſwer the wrong which might be done by the ſon to his maſter; therefore the father muſt be obliged for his ſon's true performance of the articles. It is a joint covenant, and amounts to the ſame as if it had been in this form: " It is agreed between " the parties, that, &c." It is true, at the end of the articles the covenant is in the ſingular number, " that each of them did bind " himſelf," and it muſt be ſo where the ſon is bound to perform the thing for which the covenant was made; and this clauſe is uſually inſerted, that the covenants may be taken diſtributively, " that each of the covenantors ſhould perform his part;" the latter part makes the former covenants joint or ſeveral; and this makes the covenant of the ſon bind the father, who covenanted for him as well as for himſelf.

So the plaintiff had his judgment.

* [192]

Caſe 122.

* The Lord Coningſby *againſt* Steed.

Coroner being in contempt was committed.

A RULE was made, that THE CORONERS of the county of *Hereford*, and THE HIGH BAILIFF of the franchiſe of *Leominſter* in the ſaid county, ſhould ſhew cauſe on ſuch a day why *an attachment* ſhould not iſſue againſt them.

THE CASE was as follows:

The defendant *Steed* was an attorney of this court, and formerly HIGH BAILIFF of the liberty or franchiſe of *Leominſter*. He then entered into a bond of five hundred pounds for the faithful execution of the ſaid office; but falling under the diſpleaſure of *Lord Coningſby*, he brought an action of debt againſt *Steed* upon the bond, and ſued out a *latitat* directed to the ſheriff of that county, to which writ one of the coroners was attorney, and ſolicited the ſheriff for a precept to the high bailiff of the franchiſe to make a warrant to apprehend the defendant *Steed*, who having brought his writ of privilege as an attorney of this court, and the ſheriff having returned it upon the *latitat*, he would make no precept to the high bailiff, &c. Thereupon the plaintiff brought an *alias latitat* directed likewiſe to the ſaid ſheriff, who ſtill refuſed to grant ſuch precept as aforeſaid, becauſe of the privilege of the defendant, which he (the ſheriff) had returned on the firſt *latitat*. An original was then ſued forth, directed to THE CORONERS, who accordingly made a precept to the HIGH BAILIFF (who was privy to all theſe proceedings), and then he iſſued forth his warrant

to

to the under bailiffs, who arreſted the defendant, and ſtill keep him in cuſtody.

THE LORD CONINGSBY *againſt* STEER.

THE COURT was now moved for *an attachment* againſt THE CORONERS, and the HIGH BAILIFF and UNDER BAILIFFS, for a great oppreſſion, and for an abuſe of the proceſs of this court, under a pretence and colour of juſtice.

And a rule being made for them to ſhew cauſe why an attachment ſhould not go,

IT WAS INSISTED on their behalf, by their Counſel, that though it was wrong to ſue out this *latitat* directed to THE CORONERS, yet they being officers who are to execute the proceſs of this court, are not to diſpute or queſtion, whether the writ is iſſued lawfully or not; neither are the HIGH BAILIFF or UNDER BAILIFFS to do any ſuch thing, but all of them are to obey the writ; and if ſo, then the *affidavit* of the * defendant charges them with no crime but only in obeying the proceſs; which is ſo far from being an offence, that it is probable, if the defendant had brought an action of falſe impriſonment againſt THE CORONERS and the reſt, &c. they might have juſtified under this writ and warrant. * [193]

THE COURT. A writ is never directed to THE CORONERS where the ſheriff (who is the proper officer) ſtands indifferent; and it was admitted on all ſides in this caſe, that the ſheriff was indifferent; ſo that the matter ſeems to be very ſuſpicious againſt THE CORONERS and the HIGH BAILIFF, *viz.* that they were privy to this oppreſſion.

Therefore the rule was abſolute as to them, but diſcharged as to the under bailiffs.

Afterwards, on the laſt day of *Hilary Term* following, one of the CORONERS was brought up in cuſtody into court, and bailed, the other being bailed before, to anſwer upon interrogatories the next Term.

And accordingly *Edwards*, one of the coroners, and *Carpenter*, the high bailiff, were brought into court, the other coroner, *Landen*, being in the king's bench.

Edwards depoſed, that he knew nothing of this oppreſſion, nor acted therein otherwiſe than by a general power he gave to the other coroner, *Landen*, to put his (the ſaid *Edwards*'s) name to all writs that came to him directed to THE CORONERS, &c. and that he never ſaw this writ.

HIS COUNSEL thereupon moved, that he might be diſcharged; for if one coroner give the other authority to put his name to a particular writ, that might probably be a contempt to this court, becauſe he might know the nature of ſuch a ſingle writ; but where ſuch a general truſt or power is repoſed in one coroner by another as to ſet his name to all writs which ſhall come to his hands,

THE LORD CONINGSBY *againſt* STEED.

hands, there cannot be ſo much as the leaſt ſuſpicion of any contempt.

THE COURT. This general authority muſt be intended to do all legal acts; ſo that if the other coroner to whom it was given abuſe it, ſuch abuſer cannot be a contempt by that coroner who gave the power.

Therefore this appearing to be the caſe of *Edwards*, one of the coroners, he was diſcharged.

But *Carpenter*, the HIGH BAILIFF, having owned that what he had done was by order of the plaintiff, and that he did it knowingly, though he did not adviſe the doing it, he, being in contempt, was committed.

* [194]

Caſe 123.

* Anonymous.

A prohibition will not lie after ſentence, except for cauſe on the face of the proceedings. *Ante*, 176.

PROHIBITION was moved for to the *court of admiralty*, upon an affidavit that the cauſe of action did not ariſe on the high ſea.

But it was denied PER CURIAM, becauſe ſentence is paſſed; and then no prohibition ought to be granted but for ſome cauſe apparent on the face of the record.

1. Com. Dig. "Admiralty" (F. 9.). 6. Com. Dig. "Prohibition" (D.).

* [195]

Caſe 124.

The King *againſt* The Bail of Strudwick.

The Court will not eſtreat the recognizance of bail until the non appearance of the principal be entered.

STRUDWICK, who was the principal, gave a recognizance with bail, conditioned to keep the peace for a year, and afterwards to appear in this court on the firſt day of this * Term, which he did not.

IT WAS MOVED, that his recognizance might be eſtreated, ſo that the bail might be proſecuted.

1. Bac. K. B. 762.

IT WAS INSISTED *for them by their Counſel*, that this motion was irregular, becauſe there was no default of *Strudwick*'s appearance entered.

THE COURT was of opinion, that it was improper to offer anything againſt the bail until the default of the appearance of the principal was entered; and if they had anything to offer, the time would be when a *ſcire facias* was ſued out, and it could not then be done until the default of appearance as aforeſaid was entered.

AFTERWARDS this default of appearance, &c. was entered; and the recognizance being eſtreated, a *ſcire facias* was brought againſt the bail.

IT WAS INSISTED for them, that ſince the ſaid recognizance was given, the defendant *Strudwick* had entered into another recognizance to appear and anſwer AN INFORMATION exhibited againſt him;

THE KING *againſt* THE BAIL OF STRUDWICK.

him; upon which he was afterwards convicted, and committed to THE MARSHALSEA; ſo that he being taken out of the cuſtody of the bail by a legal proceſs of this court, by that means they are diſcharged, and that he could not be brought up and rendered by them, becauſe he was eſcaped out of gaol.

There was no *committitur* of the principal entered; and if, for that reaſon, the Court ſhould be of opinion that the bail were not diſcharged,

IT WAS MOVED, that then the proceedings upon the *ſcire facias* might be ſtayed till the common day of *eſtreats*, becauſe the bail might have an opportunity of re-taking him within that time.

THE CHIEF JUSTICE held, that where a man is admitted to bail, he is, by intendment of law, in their cuſtody; but when he is taken from them by the proceſs of this court, then they are diſcharged.

ALL THE OTHER JUDGES were of a contrary opinion, *viz.* that they are not diſcharged until the *committitur* of the principal is entered; for though he was committed upon the conviction on the information, he was as much in the power of his bail as if he had been at large, or ſtill in their cuſtody; for upon a motion in this court, they might have him brought up at any time, and rendered back again in diſcharge of themſelves.

Afterwards, upon another day,

IT WAS MOVED, that the *committitur* of the principal might be entered, ſo as the bail might take advantage thereof, and that the proceedings on the *ſcire facias* might be ſtayed in the mean time.

* THE COURT would not ſtay the proceedings on the *ſcire facias*, but ordered that a *committitur* ſhould be entered on the right recognizance; for there being two, *viz.* one for *the peace* and *the appearance* of the principal, which was forfeited for his not appearing, and the other for his appearance to anſwer the information, upon which he was afterwards convicted, the *committitur* muſt be entered on the laſt recognizance. * [196]

Parr *againſt* Purbeck. Caſe 125.

If, in executing a writ of enquiry in an action of covenant for non-payment of rent reſerved on a leaſe, the jury give leſs than the rent in arrear, the Court will quaſh the inquiſition, and grant a new writ of enquiry on payment of coſts. —S. C. poſt. 213. 2. Leon. 214. 3. Leon. 177. Barnes, 230. 448. Stra. 425. 515. 5. Com. Dig. "Pleader" (Z. 5.).

IN AN ACTION OF COVENANT for non-payment of rent reſerved upon a leaſe for years, there was judgment againſt the defendant by default; and upon a writ of enquiry executed, the jury gave the plaintiff but one ſhilling damages, and no more, though he proved that the defendant owed him one hundred and fifty pounds for rent.

The

PARR *against* PURBECK.

The reaſon why the jury gave a ſhilling and no more was, becauſe the defendant took this leaſe of the plaintiff of a certain piece of ground, in which he (the leſſee) covenanted to pay ſo much rent; and the leſſor covenanted, that he ſhould have ſuch a ſewer or dam to keep water, he (the leſſee) intending to ſet up a paper-mill, but the commiſſioners of ſewers had made the water-courſe ſo narrow, that he could not have water ſufficient for his purpoſe; and being unwilling to ſue the leſſor upon this covenant, he left the land to the leſſor; and thereupon another perſon entered, and was poſſeſſed thereof, and ſet up a corn-mill, and the miller paid the rent; and all this being known to the jury, who were of the neighbourhood, they gave the plaintiff a ſhilling, and no more.

And now IT WAS MOVED to ſet aſide this writ of enquiry for the ſmallneſs of the damages; for ſince this action of covenant was brought, and the breach aſſigned for non-payment of ſo much rent in certain, the jury were obliged to find the whole. It is true, if it had been in an action for damages, they might have found part only; and it is uſual to ſet aſide a writ of enquiry for ſmallneſs of damages, where no manner of evidence is given why they ſhould be mitigated *(a)*; which is this caſe.

THE COUNSEL *for the defendant* inſiſted, that the execution of a writ of enquiry is not to be ſet aſide, and a new writ of enquiry granted, for the ſmallneſs of damages given * by the firſt jury, unleſs there be ſome contrivance or ſiniſter management; and ſo is the caſe in *Salkeld Rep.* 647. In covenant to pay a ſum certain, as in the principal caſe, and that upon default of payment it ſhould be lawful for the covenantee to enter and take the profits, &c. the defendant pleaded in bar, that the plaintiff did enter and take the profits; and upon a demurrer to this plea, the plaintiff had judgment, and a writ of enquiry, and ſmall damages; and upon a motion, a new writ of enquiry was awarded, becauſe an action of debt might have been brought upon this covenant, it being to pay a certain ſum, and in ſuch action the jury upon a writ of enquiry muſt have given the whole ſum, unleſs the defendant proves ſomething in mitigation, which was not done in that caſe; therefore the Court looking upon it to be a contrivance of the jury, awarded a new writ of enquiry; yet they held it to be a common rule, that no new writ of inquiry ſhall be granted for too ſmall damages, if there was no contrivance in the caſe; for if it ſhould, this inconveniency might follow, *viz.* the ſmall damages given by the firſt jury might influence the ſecond jury to give greater.

* [197]

THE COURT was of opinion to ſet aſide this writ of enquiry; for though the ſuppoſed breach of covenant, on the plaintiff's ſide, was true, *viz.* that the defendant had not ſufficient water to ſet up his paper-mill, and that had been given in evidence to the jury on

(*a*) See Parr *v.* Niblet, poſt. 213.

the

PARR *againſt* PURRECK.

the writ of enquiry, yet they could not have mitigated the damages on that account, much leſs when it was not given in evidence. It is true, the leſſee lef. the land for that reaſon, and another entered and poſſeſſed it, which entry, &c. might have been given in evidence upon the trial of an iſſue joined, but not to a jury upon a writ of enquiry after a judgment by *nil debet*; neither did the defendant give it in evidence to the jury, but pretends they knew it themſelves. It is admitted, that in covenant where damages are to be recovered, the jury upon a writ of enquiry are the proper judges of the *quantum* of the damages; and for that reaſon the Court will not ſet aſide their inquiry, where they give ſmall damages; but it is otherwiſe where the covenant is for payment of money, and the ſum is aſcertained, becauſe in ſuch caſe the ſum being certain, the jury cannot leſſen the damages; and this is the conſtant difference in ſuch caſes; and it is the ſame as if an *aſſumpſit* had been * brought for money upon a note under hand, for there the jury cannot mitigate the damages; if they do, the Court will ſet their verdict aſide.

* [198]

And ſo it was done in the principal caſe upon payment of coſts, &c.

Anonymous. Caſe 126.

If a declaration conſiſt of ſeveral counts, and the defendant *demur* to one of them, and judgment, on a joinder in demurrer, be given for the plaintiff, he may enter a *nolle proſequi* on the other counts without a *miſericordia*.

THE PLAINTIFF brought an action in the court of common pleas, and laid four counts in his declaration. The defendant demurred to one of them, and the plaintiff joined in demurrer, and had judgment, and then he entered a *nolle proſequi* as to the other three, but without any *miſericordia*; which the defendant believing to be erroneous, he brought a writ of error in the court of king's bench, and aſſigned this matter, there being a precedent in *Coke's Entries*, that it is erroneous (*a*).

IT WAS ARGUED *in ſupport of this judgment*, that by the ſtatute of *Jeofailes*, 16. & 17. *Car.* 2. c. 8. "no judgment after verdict, "&c. ſhall be reverſed for want of a *miſericordia*;" and by the ſtatute 4. & 5. *Anne*, c. 16. for the amendment of the law, it is enacted, "that no judgment ſhall be reverſed, or writ of enquiry "of damages ſtayed or reverſed, by reaſon of any matter which "would have been aided by any ſtatute of *Jeofailes* in caſe of a "verdict, ſo as an original writ, or bill or warrant of attorney is "filed." Now the want of a *miſericordia* is matter which is aided by the ſaid *ſtatute of Jeofailes* in caſe of a verdict; and therefore it is within the aforeſaid act made for the amendment of the law; and the judgment is not to be reverſed where that word is omitted.

1. Roll. Abr. 217.
5. Co. 49.
8. Co. 61.
4. Com. Dig. "Leet" (O. 4.).

THE COURT. If the entry of a *miſericordia* had been neceſſary at common law, there is no ſtatute of *Jeofailes* which cures the want of ſuch entry; for thoſe ſtatutes extend to judgments entered "by confeſſion, *nil dicit*, or *non ſum informatus*;" but the principal

(*a*) Co. Ent. 676.

judgment

ANONYMOUS. judgment is neither of theſe, for it is a judgment upon a demurrer joined. Now at common law there was no need of entering a *miſericordia* in ſuch caſes, becauſe ſuch entry is only *pro falſa clamore*; and here is no colour of any falſe complaint, becauſe the plaintiff ſays, *non vult ulterius proſequi*; and as for that caſe in *Coke's Entries*, many of them have been condemned.

So the judgment was affirmed.

* [199]

Caſe 127.

* Clarke *againſt* Corniſh.

Wedneſday, 26 *November* 1723.

Scire facias brought againſt the bail jointly, and a ſeveral judgment againſt each of them.

TWO PERSONS entered jointly and ſeverally into a recognizance of four thouſand pounds bail for another; and afterwards the plaintiff brought a *ſcire facias* againſt both of them jointly, and had two *nihils* returned; on which plaintiff prayed execution againſt each for the whole debt, which was awarded accordingly.

1. Sid. 339.
1. Lev. 225.

IT WAS NOW OBJECTED, that execution ought not to be awarded againſt each for the whole debt, becauſe a ſeveral judgment cannot be given upon a joint *ſcire facias*, no more than upon a bond.

It is true, a recognizance may be joint and ſeveral (as this was), and ſuch a recognizance may warrant a joint and ſeveral *ſcire facias*; but yet a ſeveral judgment can never be had upon a joint *ſcire facias* againſt each of the cognizors; for the plaintiff might have brought a *ſcire facias* againſt each of them ſeparately, and not againſt both jointly.

THE COURT was of opinion, that this was the conſtant form, and ſo the judgment was affirmed; for if the award of the execution be joint, yet the plaintiff may have ſeveral executions; and though the *ſcire facias* is joint againſt both, yet the execution may be ſeveral; for as the recognizance is joint and ſeveral, to compel the plaintiff to bring two *ſcire facias* would be only to multiply actions.

Caſe 128.

King and his Wife *againſt* Baſingham.

Where the wife ſhall not be joined in the action with her huſband.
S. C. poſt. 341.

AN ACTION ON THE CASE, &c. was brought in the commen pleas by huſband and wife, in which the huſband declared upon ſeveral counts, and one of them was for money lent to the defendant by him and his wife, by his conſent, and promiſe made to them both.

2. Mod. 269.
10. Mod 161.
Ld. Ray. 443.
Sid. 346.

Upon *non aſſumpſit* pleaded the plaintiff had a verdict.

1. Stra. 61. 229. 2. Stra. 726. 977. 1. Bac. Abr. "Baron and Feme" (K.).

IT

KING AND HIS WIFE *againſt* BASINGHALL.

IT WAS MOVED *in arreſt of judgment*, that the declaration was ill, becauſe the wife was joined in this action with her huſband, which ſhe ought not to be; and that the joining her in the action being matter of ſubſtance, was not helped by this verdict; for by this means, if the huſband ſhould die, then what is recovered would ſurvive to her, when it ought to go to the executor of the huſband.

But the judgment was affirmed.

A WRIT OF ERROR being brought in the court of king's bench, the ſame objection was made there; and that this action was founded on a contract made by the wife, when by law ſhe cannot make any contract during the coverture. Sid. 346.

LEE *excepted to the declaration*, that the money being alledged to be lent by huſband and wife, muſt be preſumed to be lent during coverture; and then the money is the huſband's money only, for which he alone ought to have brought his action; for a wife can have no intereſt in money during coverture. Cro. Jac. 644. pl.

* IT WAS ARGUED *in ſupport of the action*, that this objection came too late, it being after a verdict; and that it ought to be made good, if by any conſtruction it might; therefore it ſhall be intended that the huſband and wife were joint traders, and that ſhe lent the money to the defendant before marriage. Beſides, where a promiſe is made to the wife, if the huſband bring an action for himſelf and his wife, he makes that promiſe good by his own conſent. * [200] Cro. Eliz. 61. Cro. Jac. 77. 205. Roll. Abr. 32. Sid. 25. 2. Sid. 128. Allen, 36. 2. Mod. 217.

THE CHIEF JUSTICE. If the money was lent during coverture, the declaration is falſe, becauſe then the wife could have no money.

Adjournatur (*a*).

(*a*) This caſe was argued a ſecond time in Trinity Term, 10. *Geo.* 1. on Saturday, 20 June 1724. NOTE *to former edition.* And in Hilary Term, 11. *Geo.* 1. it was argued a third time, when the Court inclined againſt the plaintiff, S. C. poſt. 341.

The Pariſh of Wrotham *againſt* The Pariſh of St. Olave. Caſe 179.

Attachment againſt pariſh-officers for a contrivance in ſettling a poor man and his family.

JOHN RICHARDS, his wife, and five children, were removed by an order of two juſtices from the pariſh of *Capell* to the pariſh of *Wrotham*, in *Kent*, that being adjudged to be the laſt place of their legal ſettlement. Afterwards, upon an appeal to the next quarter-ſeſſions, that order was quaſhed; and thereupon the poor man and his family came back to the pariſh of *Capell*, and by another order were again removed to *Wrotham*. This order, being removed into the court of king's bench by *certiorari*, was, by the conſent of both parties, referred to the Judge of aſſize, who, upon hearing the evidence on both ſides, directed, that the matter ſhould

WROTHAM PARISH *againſt* THE PARISH of ST. OLAVE.

ſhould be tried upon a feigned iſſue, which was done accordingly at the next aſſizes; and the pariſh of *Wrotham* had a verdict; and ſo both the former orders were quaſhed. But the pariſh of *Capell* being diſſatisfied with this verdict, procured the pariſh-officers of *St. Olave*, in *Southwark*, to permit this man and his family to dwell in a tenement there, on purpoſe that they might remove him to *Wrotham*. Accordingly they came into the pariſh of *St. Olave*, and lived there ſome time, and were afterwards removed from thence by an order of two juſtices to *Wrotham*, which order was confirmed upon an appeal to the next ſeſſions; ſo that by this means the pariſh of *Capell* was diſcharged of him, *[201] becauſe * an order confirmed upon an appeal makes a good ſettlement in that pariſh by whom the appeal is brought, againſt all other pariſhes whatſoever.

It was now moved, that this laſt order might be quaſhed, and for *an attachment* againſt the churchwardens, &c. of *Capell*, for this contrivance.

But THE COURT would not quaſh the order, but made a rule for them to ſhew cauſe on ſuch a day why *an attachment* ſhould not go; and probably when they come to ſhew cauſe, they may conſent to have the orders quaſhed; but they ſhewed no cauſe, and ſo the rule was made abſolute.

Caſe 130.

The King *againſt* Jones.

Verdict given upon an information in nature of a *quo warranto*, whether it may be ſet aſide; all the Judges of *England* equally divided.
S. C. ante, 166.
S. C. poſt. 291.
S. C. 2. Stra. 782.
S. C. 3. Bro. C. P. 428.

THIS was an information in nature of a *quo warranto* againſt *Jones* and *Powell*, for pretending to be burgeſſes of *Brecknock*, in *Wales*, and to ſhew by what authority they claimed to be burgeſſes, &c.

Upon not guilty pleaded, the cauſe came on to trial at the aſſizes in *Hereford*; and upon hearing the evidence, the Counſel for the king deſired that the matter might be found ſpecially, for that it appeared by the charter of this corporation that the burgeſſes, and all other officers thereof, ſhould be choſen *de inhabitantibus*, and that the defendants *Jones* and *Powell* were not inhabitants of *Brecknock*.

But there being evidence given, that the uſage had been againſt the charter, the jury gave a general verdict upon the uſage, *viz.* that the defendants were not guilty.

And now it was moved to ſet aſide this verdict, for two reaſons:

FIRST, Becauſe it was given againſt evidence.

SECONDLY, Becauſe the jury refuſed to find a ſpecial verdict which they ought to have done when it was required.

And

And becauſe of the difficulty of the caſe, this queſtion was referred to ALL THE JUDGES OF ENGLAND (*a*), Whether a verdict by which the defendant is found "not guilty" on an information in nature of a *quo warranto*, could be ſet aſide, and a new trial granted.

And THE JUDGES were equally divided, two againſt two in each court, ſo that not one Court was unanimous in opinion of either ſide; but ſix of them were of opinion, that the verdict might be ſet aſide, and ſix were of a contrary opinion.

* And it being now moved again to ſet aſide this verdict for the reaſons before-mentioned, * [202]

THE COURT was of opinion, that ſince this was become a queſtion, Whether it could be done, or not? it ought to be determined; that it was certain a verdict in a criminal caſe could not be ſet aſide for finding againſt evidence; but then the queſtion will be, Whether this caſe is criminal? And as to the other reaſon for ſetting aſide this verdict, which is, that the jury refuſed to find the matter ſpecially, there ſeems to be ſome colour in it; for upon ſuch refuſal, even a verdict given by a ſpecial jury, and upon a trial at bar, hath been ſet aſide; and certainly it will not be denied, but that a miſdemeanor of a jury will avoid their verdict; and it is a miſdemeanor in them to refuſe the finding a ſpecial verdict when deſired, becauſe every man has as much right to have a point of law determined by the Judges as he has to have any matter of fact tried by a jury; and it would be unreaſonable, that it ſhould be in the power of any jury to hinder the trial of matters in ſuch a due method as the law preſcribes; therefore a rule was made, that the plaintiffs ſhould ſhew cauſe why this verdict ſhould not be ſet aſide.

And upon another (*b*) day THE COUNSEL *for the defendants* offered the following reaſons why this verdict ought not to be ſet aſide, and a new trial granted.

FIRST, For that it was never yet determined that any Court could ſet aſide a verdict, or grant a new trial, where the defendant was acquitted in a *quo warranto* brought againſt him for uſurping any franchiſe; and an information in nature of a *quo warranto* is a criminal proſecution, in which proſecutions the Court will never ſet aſide any verdict and grant a new trial. It was ſo adjudged in the caſe of *The King v. Read* (*c*), which was an information againſt the defendant for perjury, in giving falſe evidence at a trial of a cauſe in the court of king's bench; he was acquitted upon the information; and upon a motion for a new trial, upon an affidavit

(*a*) This reference was not made in the preſent caſe, but in the caſe of the Mayor of Saliſbury.—NOTE *to the former edition.*

(*b*) The firſt account to be found of this caſe is in Hilary Term, 10. *Geo.* towards the end of the Term, at which time the defendants came to ſhew cauſe. —NOTE *to former edition.*

(*c*) T. Ray. 34. 1. Lev. 9. 1. Sid. 149. 153.

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made that ſome material witneſſes to prove the perjury were abſent, it was not granted. The caſe of *The King v. Sir John Jackſon* (*a*) went farther than any caſe of this nature, which was an action of treſpaſs brought by the plaintiff *Jackſon* againſt one *Primate*; and the plaintiff had a verdict; with which the defendant *Primate* being not ſatisfied, he indicted the witneſſes * of the plaintiff for perjury; which being ready for trial, *Sir John Jackſon* ordered his ſervants to beat and impriſon thoſe witneſſes who were to prove the perjury, ſo that they could not be at the trial; and thereupon the defendants were acquitted. Now though all this matter appeared to the Court, upon a motion for a new trial it was not granted, becauſe it was in a criminal caſe in which the parties were acquitted; but an information was ordered againſt *Jackſon*, who was convicted and fined. And this is likewiſe a criminal proſecution in the very nature of it. It is true, by the ſtatute of 9. *Anne*, c. 20. a man is admitted to try his private right in an information; the words of which ſtatute are, "If any man ſhall "uſurp an office in a corporation, it ſhall be lawful for the proper "officer of the king's bench court to exhibit an information "againſt him in the nature of a *quo warranto*, at the relation "of any perſon deſiring to proſecute, who ſhall be mentioned in "ſuch information as relator againſt ſuch uſurper, and to proceed "as uſual, &c." And though by that ſtatute an information has the quality of a civil action, *viz.* if the defendant ſhall be found guilty, he ſhall pay coſts; and ſo likewiſe ſhall THE RELATOR, if judgment be given againſt him; yet ſtill the proſecution is for an offence of a mixed nature, and the civil part cannot be tried without the trial of the criminal part; and there is no difference between an information in the nature of a *quo warranto* and an information merely criminal as to the ſetting aſide a verdict in either. And hitherto ſuch informations have been accounted criminal proſecutions, and that by the plain opinion of the Legiſlature; for it is well known, that actions *qui tam*, &c. informations, and indictments, are excepted out of the ſtatute of *Jeofailes*; and the reaſon is, becauſe thoſe are all criminal proſecutions, and for that reaſon they would not have extended to informations in nature of a *quo warranto*; and therefore it was expreſsly provided by the Legiſlature, that all ſtatutes of *Jeofailes* ſhall extend to ſuch informations.

* [203]

It is true, upon the firſt motion of this matter in court, there were ſome other reaſons offered for ſetting aſide this verdict, for ſome other miſdemeanor of the jury, *viz.* that after one of them was ſworn, and had heard part of the evidence for the proſecutor, he went out of the hall to make water, and was abſent about two minutes (*b*), and but ten or fifteen yards diſtant; and that when they all withdrew * to conſider of a verdict, and could not agree, they all conſented to poll, and to find for that ſide on which the majority ſhould fall, and that ſeven polled for the defendant; and thereupon they found a verdict for him.

* [204]

(*a*) 1. Lev. 124.

(*b*) As the juryman himſelf ſwore by affidavit.

Now

Now as to this matter, it is of no weight to ſet aſide this verdict; it was not ſo much as mentioned when the verdict was brought in, nor was any exception made by the Judge (who tried the cauſe) to any of the jury who were impanelled to try the like iſſue the next day, between *The King v. Powell.*

The chiefeſt reaſon for ſetting aſide this verdict was, that it was given againſt evidence, and their refuſal to find a ſpecial verdict when required; for it being expreſsly provided by their charter, that the burgeſſes of this corporation ſhould be choſen *de inhabitantibus*, but the uſage being contrary, they gave a general verdict upon the uſage, when they ought to have found the matter ſpecially.

Now in anſwer to the firſt reaſon, it is the conſtant rule never to ſet aſide a verdict for being againſt evidence, unleſs it was inſiſted to be ſo at the trial, eſpecially after a defendant is acquitted; and then as to the other reaſon, *viz.* their finding againſt the expreſs proviſion of their charter, when they ought to have found that matter ſpecially, they might have cured it by ſpecial pleading, if they had thought it proper ſo to do.

But this is not a finding againſt their charter, becauſe thoſe perſons who lived within ſuch precincts, and had uſually been choſen burgeſſes, and exerciſed other offices in that corporation, may properly be ſaid to be inhabitants thereof within the meaning of this charter; therefore this Court, without ſome extraordinary inducement or great inconveniency ſhewn, will not make a precedent to take away the plea of *autrefois acquit* from the ſubject, which is a fence allowed by the common law againſt the inſults of power.

ON THE OTHER SIDE *it was argued*, to ſet aſide this verdict, that an information in nature of a *quo warranto* was not a criminal, but a civil proſecution. It is true, the ſtatute 9. *Anne*, c. 20. is, "That if the defendant be found guilty of an uſurpation, the Court "may fine him;" but that does not make it a criminal proſecution, becauſe the fine is only a conſequence, that the right was not in the perſon who is to pay it; for the right is the only thing, and probably for that reaſon the Counſel on the other ſide did not ſo much as mention the fine.

* That which was now principally inſiſted on was, the finding againſt the expreſs words of the charter, which appoints that the burgeſſes ſhall be choſen *de inhabitantibus* of the corporation, when the defendants were not inhabitants thereof. It is true, the charter confirms the uſages there, but it cannot confirm ſuch uſages which are againſt the expreſs words of the charter itſelf. * [205]

So that the queſtion is, Whether perſons who are not inhabitants of the corporation could be good burgeſſes thereof by uſage? which ought to have been found ſpecially, becauſe the uſage being inconſiſtent with the charter, muſt for that reaſon be quite deſtroyed, as in the caſe of *The King v. Philips*, where there were two charters, and the laſt contrary to the firſt, it was reſolved that the firſt was merged in the laſt.

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So in the principal caſe, though it had been an ancient uſage to chooſe burgeſſes not dwelling in that corporation, yet ſuch uſage muſt be merged in the charter, for that abrogates all the uſages and cuſtoms which are inconſiſtent with the charter; and therefore they can never ſubſiſt againſt it.

As to the miſdemeanor of a juryman, it is true, if he eat or drink whilſt the verdict is under conſideration, he may be puniſhed, but that doth not make it void; though it is otherwiſe if he abſent himſelf, becauſe he cannot hear all the evidence, ſo as to be rightly informed of the whole; for no man knows what part of an argument, or what ſort of evidence, may convince him; therefore he ought to hear the whole, becauſe one part may either ſtrengthen or weaken the other.

Beſides, the polling by the jury is like the fillip of croſs and pile, if croſs for the plaintiff, if pile for the defendant; and certainly where verdicts are given by the majority of the poll, they cannot be given upon due conſideration of the cauſe; therefore if there was nothing elſe in the caſe, that is a ſufficient reaſon to ſet aſide this verdict; but it could not be objected at the trial, becauſe this miſdemeanor was not then known.

As for the caſe of *Sir John Jackſon*, who ordered his ſervants to beat and impriſon *Primate*'s witneſſes, becauſe they ſhould not be at a trial to prove *Sir John*'s witneſſes guilty of perjury, and thereupon thoſe witneſſes were acquitted, and no new trial was granted; it is true, this is reported in *Levinz*, but there is no clear reaſon to ſupport the judgment given in that caſe; it is no more than for a man to be diſcharged of one crime by committing another; for the
* [206] * defendants in that caſe were acquitted of perjury by beating and impriſoning the witneſſes who were to prove it at a trial ready to come on, and no new trial was granted, becauſe it was in a criminal caſe; but admitting it to be ſo in a caſe merely criminal, it is not ſo in an information in nature of a *quo warranto*; for if it ſhould, it would be of the utmoſt ill conſequence to all corporations, and it might endanger our very Conſtitution.

But it is not a ſettled rule, that a new trial cannot be granted in a criminal caſe, where the defendant hath been acquitted; for if the acquittal was upon a trial without due notice, certainly a new trial might be granted; and the rather, becauſe no bill of exceptions will lie where the crown is concerned in the proſecution.

THE COURT firſt anſwered the objections, and ſaid, As to the miſbehaviour of the juryman, who was abſent for two minutes, it was not puniſhable; but if it was, it ſhall not avoid the verdict: and as for their polling and giving a verdict where the majority fell, *per* PRATT, *Chief Juſtice*, it is not like the caſe of the fillip for a ſhilling, if croſs for the plaintiff, if pile for the defendant; becauſe that was a verdict which depended merely on chance; but the *(a)* pol-

(*a*) FORTESCUE, *Juſtice*, was of a contrary opinion, and ſaid, polling was little better than chance; that it was againſt the deſign of the inſtitution of juries; and it was like the caſe of croſs and pile; for the jury ſhould convince one another by good reaſoning.

ling

ling was only giving credit and weight to the authority of the greater number of the jury.

As to the objection, that the jury ſhould have found a ſpecial, and not a general verdict upon the uſage, it doth not appear that the Judge who tried the cauſe directed them to find the matter ſpecially; for he might think that there being no negative words in the charter to exclude their ancient uſages, that ſuch cuſtoms and uſages which they had before the charter did ſtill ſubſiſt; ſo that this diſcharges them from the imputation of finding againſt the direction of the Judge; but if he had directed them to find the matter ſpecially, in ſuch caſe they ought to find it ſo, becauſe every ſubject hath a right to have a point of law determined by the Court, and not to have it huddled up in a general verdict by a country jury.

* The objection which goes to the whole is, that a new trial cannot be granted in a criminal cauſe where the defendant is acquitted: now, whether it may be granted, or not, is a queſtion fit to be conſidered. It is true, it is generally held that it cannot; and ſo it was adjudged in *Sir John Jackſon's Caſe* (*a*); but that is a very extraordinary caſe, for it is inconſiſtent with reaſon not to grant a new trial where a man is acquitted by his own artifice of a crime not capital; for it is (as hath been obſerved), that where a man hath committed one crime, he ſhall have it in his power to avoid juſtice by committing another. * [207]

But admitting that caſe to be law, then the queſtion will be, Whether a proſecution by an information in nature of a *quo warranto* is a criminal cauſe, or not? upon which queſtion the Judges of *England* have been equally divided.

PRATT, *Chief Juſtice.* If this is not to be looked on as a criminal proſecution, I ſhould readily grant a new trial. This lately hath been made a queſtion, and was referred to all the Judges, who were equally divided in opinion, ſix againſt ſix, and each Court was alſo divided: I was for a new trial (*b*).

FORTESCUE, *Juſtice.* I was againſt a new trial, and am ſo ſtill. Indictments are ſometimes uſed only for trying a right, and yet it was never pretended to grant a new trial in them. It is objected, that this is a mixed ſort of a proſecution, and not entirely criminal: if ſo, ſtill it is criminal. It is objected, that the fine impoſed is always ſmall, but it may be large.

RAYMOND, *Juſtice.* Theſe informations are only methods to try the right, and ought to be looked on as civil actions; and though a fine is impoſed, yet that makes no alteration; for ſometimes in actions confeſſedly of a civil nature a fine is ſet, as in actions of treſpaſs *vi et armis*. This is my preſent opinion; but I would adviſe.

THE COURT was of opinion, that the verdict was againſt law; for the charter is to be underſtood negatively *de inhabitantibus*,

(*a*)
(*b*) Rex v. Bennett, 21. Viner Abr. 480. pl. 17. S. C. 1. Stra. 101.

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and ſo deſtroys the uſage; and where a jury bring in a verdict againſt law, agreeable or not agreeable to the direction of the Judge, the verdict ought to be ſet aſide.

*[208] * But afterwards, on the laſt day of *Hilary Term* following, THE CHIEF JUSTICE declared, that it was the opinion of THE WHOLE COURT to grant *a new trial*, if it could be granted by law; but it being a point wherein the Judges had ſo much differed, it ought to be well conſidered, becauſe it affected all the corporations in *England*; and that it was never yet known, that a verdict was ſet aſide by which the defendant was acquitted in any caſe whatſoever upon a criminal proſecution.

Caſe 131.

Turner *againſt* Turner.

S. C. Caſ. Chan. 49. Stra. 708. Sel. Caſ. in Chan. 49. 2 Wil. Rep. 297. 2. Eq. Caſ. Abr. 238. pl. 18.

THIS was a trial at bar, upon a feigned iſſue directed out of the court of chancery.

The only queſtion was, Whether *David Turner*, the grandfather both of the plaintiff and of the defendant, had cancelled a will made by him in the year 1716, or not?

The caſe was thus: *David Turner* being ſeiſed of *gavelkind lands* in *Kent*, to the value of four hundred pounds, had iſſue *George Turner*, his eldeſt ſon, by one venter, and *David Turner*, his youngeſt ſon, by another venter; both of which ſons died in the life-time of their father, *David Turner*, the teſtator. *George*, the eldeſt ſon by the firſt venter, left iſſue the now plaintiff; and *David*, the eldeſt ſon by the ſecond venter, left iſſue the defendant; and *David Turner*, their grandfather, in the year 1716, made a will in favour of *George*, his eldeſt ſon by his firſt venter, which, as was inſiſted on by the plaintiff, was not cancelled by the teſtator in his life-time, but by the now defendant after the death of the ſaid teſtator, that the eſtate might equally deſcend between them.

But upon full proof that the teſtator cancelled his will in his life-time, and ſaid, that he intended his eſtate ſhould equally deſcend and come to both his grandchildren, the defendant had a verdict.

*[209]

Caſe 132.

The King *againſt* Burchet and his Attorney, and the Town-Clerk of Guildford.

An *attachment* lies for replevying goods *diſtrained* under a conviction on a penal ſtatute.

S. C. 1. Stra. 567.

BURCHET was convicted by a juſtice of peace for keeping dogs, nets, and ferrets, to catch conies, not being qualified, &c. and by a warrant from the ſaid juſtice, * his goods were diſtrained for the forfeiture; and whilſt they were in the poſſeſſion of the conſtable, and before they were ſold, the town-clerk granted a *replevin* to take them from the conſtable.

IT WAS MOVED to ſet the *replevin* aſide, becauſe goods thus taken by *diſtreſs* on ſuch convictions are irrepleviable, and for *an attachment* againſt the town-clerk.

THE

THE COURT would not ſet aſide the *replevin*, but made a rule to ſhew cauſe why *an attachment* ſhould not go *(a)*. THE KING *againſt* BURCHET, AND OTHERS.

The rule was afterwards diſcharged by EYRE, *Juſtice*, then alone upon the bench *(b)*.

(a) Vide ante, 96.

(b) The reaſon of its being diſcharged was, becauſe it was only a contempt to the inferior juriſdiction of the juſtices, in which caſe the court of king's bench never interpoſes, S. C. 1. Stra. 567. But in Eaſter Term, 16. *Geo.* 2. the court of king's bench granted an *attachment* againſt the under-ſheriff of *Cumberland*, for granting a *replevin* of goods diſtrained on a conviction of deer-ſtealing, Rex *v.* Monkhouſe, 3. Stra. 1184. So alſo for replevying goods diſtrained for a fine impoſed on an officer by commiſſioners of land-tax, Rex *v.* Oliver, Bunb. 14. And in another caſe, the Court, though they refuſed to grant an *attachment*, granted an *information* againſt the *party* for ſuing a replevin of goods diſtrained under the highway act, and refuſed it againſt the ſheriff only, becauſe it did not appear that he knew they were goods diſtrained under a juſtice's warrant, Rex *v.* Sheriff of Leiceſterſhire, 1. Bar. K. B. 110.

HILARY TERM,

The Tenth of George the Firſt,

IN

The King's Bench.

Sir John Pratt, *Knt. Chief Juſtice.*
Sir Lyttleton Powys, *Knt.*
Sir John Forteſcue Aland, *Knt.* } *Juſtices.*
Sir Robert Raymond, *Knt.*
Sir Philip Yorke, *Knt. Attorney General.*
Sir Clement Wearg, *Knt. Solicitor General.*

The King *againſt* The Mayor of Kingſton upon Hull. Caſe 133.

UPON A MOTION laſt Term, a rule was made, that *a mandamus* ſhould go to THE MAYOR OF KINGSTON, to aſſemble and keep courts, and to do the office of that corporation.

Several perſons cannot be joined in one *mandamus* to A MAYOR to admit them to their *freedom*, for each has a diſtinct and different right.

In drawing up the writ, the clerk added theſe words, "and to "admit all thoſe to their freedom who have a right to be free of "that corporation."

IT WAS NOW MOVED to ſet aſide this rule, becauſe all who have a right to be free cannot be joined in one *mandamus*, as it was reſolved in the caſe of the nine common-council-men of *Cheſter*, in the ſixth year of *William the Third*, becauſe every one hath a ſeparate right; therefore two, or more, could not be * joined in this writ; for where ſeveral are joined, there can be no traverſe taken, becauſe no one is party to it.

S. C. 1. Stra. 578. 1. Salk. 433. 436. 5. Mod. 11.

* [210]

THE COURT was of opinion, that the *mandamus* was ill, and not warranted by the rule of the Court; therefore if it had been returned, it ſhould have been *quaſhed*; but being not returned, it ſhall be *ſuperſeded*, that THE MAYOR may not be obliged to make a return.

The

Caſe 134. The King *againſt* The Mayor of Whitchurch and Others.

Trial at bar denied.

A RULE was made againſt THE MAYOR and other officers of the borough of *Whitchurch*, to ſhew cauſe why AN INFORMATION ſhould not go againſt them, being choſen into their reſpective offices, and not dwelling in the borough; and by a jury of non-reſidents being impanelled for that purpoſe, againſt which choice the inhabitants of this borough proteſted, it being contrary to their antient uſage, as was now ſuggeſted.

THE COUNSEL *for the defendants* ſhewed for cauſe againſt this rule, that all the officers of this borough are to be conſtantly choſen by freeholders thereof; and that ſome of the inhabitants who were freeholders, were ſummoned to be of the jury, but they refuſed to appear, pretending they would not ſerve with thoſe who were not inhabitants of the borough, but out-dwellers, and therefore excluded from being of the jury; and thereupon others were returned who would ſerve. That ever ſince the year 1641, the out-dwellers who had freeholds in the borough were returned jurymen, which appeared by the entries made in their borough-books, and ſuch out-dwellers had ſerved in all the offices thereof. That *Whitchurch* is an antient borough by preſcription, and that the jury thus impanelled, as aforeſaid, did not ſerve in a court-leet, but in a borough-court; for if it had been to ſerve in a leet, then it muſt be by inhabitants, but that in a borough-court none but freeholders are to be of the jury, which freeholders might be out-dwellers, ſo as they had a freehold within the borough. That all the jury had freeholds in the borough, and by ſuch a jury aſſembled at a borough-court the defendants were lawfully choſen.

But the rule was made abſolute by TWO JUDGES againſt ONE, there being but three in court; for this being a matter of right, it
* [211] was fit to be tried by a jury, who are the * proper judges of evidence.

THE COURT, at another day, was moved for a trial AT BAR upon ſome affidavits, that the freehold to the value of a thouſand pounds might come in queſtion.

But it was denied for no other reaſon, but that it was a borough cauſe.

Caſe 135. The Company of Muſicians in London, OR The Chamberlain of London, *againſt* Green.

Debt upon a bye-law for exerciſing a trade, &c. the defendant being a muſician, which is a ſcience.—5. Co. 62. 3. Leon. 264. 1. Roll. Rep. 109.

A BYE-LAW was made in *London*, that no perſon but a freeman of that city ſhould exerciſe any trade or art therein under ſuch a penalty.

Mr.

THE COMPANY OF MUSICIANS IN LONDON, OR THE CHAMBERLAIN OF LONDON, *againſt* GREEN.

Mr. Green not being free of the city of *London* played as muſician at ſeveral city entertainments, particularly at the feaſt of the ſons of the clergy, for which he was ſued in the ſheriff's court in *London*, for uſing the trade of a muſician, not being free of the city; which cauſe was removed into this court by *habeas corpus*.

IT WAS INSISTED for him, that he was a muſician, and attended with other maſters in muſic at the feaſt of clergymens ſons, being employed by THE STEWARDS of the ſaid feaſt; and becauſe they did not likewiſe employ the city muſicians, therefore they ſet up this proſecution againſt the defendant, and would now extend this bye-law to muſic, which is *a ſcience*, and not *a trade*; and if this ſhould be allowed, they may extend it to *lawyers* who are not freemen, and who attend the courts there, for the law is a ſcience, and ſo is muſic: beſides, it is improper to have the bye-laws of *London* tried in any of the courts of *London*.—The arguing of a lawyer is wind-muſic, and no handicraft trade.

IT WAS ARGUED *for the plaintiff*, that a *procedendo* ſhould be granted, for that the commitment was good, and ſo was the bye-law; and that this court cannot try whether the caſe of the defendant *Green* is within this bye-law or not, becauſe it is triable only in *London*, where the plaintiff muſt declare in a proper court, and on a ſpecial cuſtom to make bye-laws, for otherwiſe all ſuch laws might be controverted in this court,

THE COUNSEL *for the defendant* ſaid, that the plaintiff's Counſel had touched very lightly upon the ſtring; for that the profeſſion of muſic was not within this bye-law, which extended only to handicraft trades; and that muſic was not a trade, but a ſcience, in which ſcience degrees were taken in all the univerſities in *Europe*.

THE COURT. Let there be *a conſultation*, it being not proper to determine this queſtion upon motion. The *cuſtoms of London* are always tried in their own courts: but if the Judge refuſe, upon requeſt, to let the fact be ſtated ſpecially, we will ſet aſide the verdict.

* And therefore *a procedendo* was granted, but with this direction, that the plaintiff ſhould admit the matter to be found ſpecially at the trial, otherwiſe the Court would not grant another *procedendo* in the like caſe. * [212]

THE CAUSE was afterwards tried in *London*, and at the trial a difference was taken between exerciſing ſuch handicrafts for lucre and gain (which was the defendant's caſe) and exerciſing them for diverſion and amuſement, and that the one was within the bye-law, and the other not.

And thereupon the plaintiff had a verdict and judgment, and afterwards the defendant took up his freedom, and acquieſced.

Morſe

Caſe 136. Morſe *againſt* Sury.

Award, where good.

AN ACTION OF DEBT upon a bond for performance of an award where the ſubmiſſion was "of all actions, &c. between the "plaintiff and the defendant."

The defendant pleaded "*nullum arbitrium.*"

The plaintiff replied, and ſet forth *an award* made by the arbitrators on ſuch a day "of all actions between the plaintiff and "the defendant *and his wife*," wherein they awarded, that the defendant and his wife ſhould pay twenty pounds to the plaintiff on ſuch a day, in full ſatisfaction of all law-charges due to him by the defendant's wife as executrix of one *Bodily* her firſt huſband; and that both the plaintiff and the defendant ſhould equally pay to the arbitrators the charges of making the award, and that they ſhould execute mutual releaſes. The breach aſſigned was, that the defendant had not paid the twenty pounds on the day.

REEVE *for the defendant* excepted to the award:

FIRST, For that the ſubmiſſion being only of all differences between the plaintiff and defendant, the award that the defendant and his wife ſhall pay ſo much money to the plaintiff is ill, becauſe no difference in which the wife is party is ſubmitted to the arbitrators *(a)*. If *A.* and *B.* ſubmit to the arbitrament of *J. S.* of all ſuits and actions pending between them, the arbitrators cannot make an award of an action which *B.* and his wife have againſt *A. (b)*, for that is out of the ſubmiſſion. In the caſe of *Barnardiſton v. Fowler (c)*, an award that all proſecutions ſhould ceaſe in all actions between *A.* and *B.* will not extend to ſuits where *A.* is plaintiff againſt *B.* and others defendants.

SECONDLY, The arbitrators have awarded money to be paid to themſelves, which is illegal.

* [213] * SIR CLEMENT WEARG, *Soliciter General, contra.*

FIRST, The caſe in *Roll's Abridgment* differs from this caſe; becauſe there the wife had a demand of which ſhe would have been barred without being made a party to the ſubmiſſion. There is a caſe in *Cro. Jac.* 447. in point, where a ſubmiſſion was of all demands betwixt plaintiff and defendant, and award that defendant pay, whereas it was a debt from the defendant's wife as executrix, and yet held good.

SECONDLY, That part is void, but yet the reſt is good.

THE COURT was of the ſame opinion; wherefore judgment for the plaintiff.

(*a*) 1. Roll. Abr. 246. pl. 4.
(*b*)
(*c*) Hilary Term, 12. *Ann.* 10. Mod. 204. Gilbert's Caſes, 125.

Parr

Parr *againſt* Niblett.

Caſe 137.

A writ of inquiry may be ſet aſide for inſufficiency of damages.

S. C. ante, Parr v. Purbeck.

AFTER a writ of inquiry was executed, it was ſet aſide, becauſe the jury gave too little damages; and a rule was made, that on payment of coſts a new writ of inquiry might be executed, which was done, but without paying the coſts.

IT WAS NOW MOVED, that this laſt writ of inquiry might likewiſe be ſet aſide.

And a rule being made for that purpoſe, unleſs cauſe ſhewed on ſuch a day why it ſhould not,

IT WAS NOW SHEWED for cauſe, that the plaintiff had done all in his power to get the coſts taxed, but could not prevail; and that the defendant's attorney promiſed him, that he would take notice of executing this writ of inquiry, as if the coſts had been already paid; therefore it was inſiſted, that upon payment of coſts, the rule might be diſcharged.

IT WAS SAID *on the other ſide*, that this ſecond writ of inquiry was to be executed upon payment of coſts, and not otherwiſe, and that the coſts not being paid, that writ could not be executed.

THE COURT ordered the attornies on both ſides to attend THE MASTER of the office, and that the plaintiff ſhould pay what coſts THE MASTER ſhould tax, and that upon payment thereof the rule for ſetting aſide the writ of inquiry ſhould be diſcharged.

* The King *againſt* Mary Johnſon.

Caſe 138.

If a female child of nine years of age be brought into court on a *habeas corpus*, in the cuſtody of her nurſe, the Court will order her to be delivered to her teſtamentary guardian; for ſhe is too young to judge whether ſhe is or is not free or under reſtraint.

S. C. 2. Ld. Ray. 1333.

S. C. Stra. 579.

See Stra. 444. 982.

3 Peer Wm. 151.

3. Burr. 1436.

UPON A MOTION for a *habeas corpus* to be directed to the defendant, to bring up the body of a child about ten years old into this court, which ſhe, the defendant, unjuſtly kept from the guardian;

THE CASE was thus: This child remained under the care of Mrs. ———, an old acquaintance of the family, who had bred the child for ſome years paſt; her father died about ſix months paſt, and left the charge of this child to his own brother, *J. Howland*, the preſent guardian, and now to him, who is intitled to the eſtate, if the child ſhould die without iſſue; ſo that he is not a proper perſon to be guardian. Beſides, a *habeas corpus* is a writ for no other uſe but to ſet perſons at liberty, and there is no reaſon why it ſhould be granted in this caſe, becauſe the rightful guardian has a proper action to recover the child. It is true, the Court *ex debito juſtitiæ* is to grant it, but the merits of the cauſe ſhall not be tried upon it.

THE COURT doubted whether they could grant it or not, it being the buſineſs of the court of *Chancery* to reſtore children to their proper guardians.

This

THE KING *againſt* MARY JOHNSON.

This is not the firſt time that, upon a return of a *habeas corpus*, perſons have been delivered by this Court to thoſe who have a right to receive them; it was done by HOLT, *Chief Juſtice*, and in the *Lady Harriot Berkeley's Caſe (a)*, upon the return of a *habeas corpus*, it being ſuggeſted that ſhe was married; in the *Lady Rawlinſon's Caſe (b)*, who was detained by her huſband againſt her will; both ladies the Court left to their own election, becauſe they were both of diſcretion. And likewiſe in that caſe where the *Lord Angleſea (c)* deviſed his eſtate to his daughter, and appointed who ſhould be her guardian, and expreſsly declared in his will, that if ſhe lived with her mother, half her eſtate ſhould be forfeited; yet this Court would not relieve: but ſhe being brought up by *habeas corpus*, was left to her own choice, whether ſhe would live with her mother, though by her living with her ſhe was to forfeit half her eſtate.

* [215] * But in the principal caſe THE COURT would make no rule, becauſe the guardian was not in court.

But on another day he came into court, and then the child was delivered to him without farther argument, though the child cried not to be delivered to her uncle: for the Court reſolved that he muſt take her if he demands her; and ordered him ſo to do, and he did take her away out of court, with his own hands *(d)*.

(*a*) 3. State Trials, 544.
(*b*) Ante, 22.
(*c*)
(*d*) The Court delivered the child to the guardian in the preſent caſe, becauſe from her extreme youth ſhe had no judgment of her own, S. C. Stra. 390. for the Court in theſe caſes is only bound to ſee that the party is not under an illegal reſtraint, Rex *v.* Clarkſon, 1. Stra. 444. and in reſpect to delivering the party to any particular perſon, will judge upon the circumſtances of each particular caſe and give direction accordingly, Catley's Caſe, 3. Burr. 1437.; for the right of guardianſhip ought not to be determined in this ſummary way, either in the court of king's bench, Rex *v.* Smith, 2. Stra. 982. or by the court of chancery, *Ex parte* Hopkins, 3. Peer Wms. 152. unleſs, perhaps, in the caſe of a guardian appointed by the Court, Eyre *v.* Shafſbury, 2. Peer Wms. 117, 118. Goodall *v.* Harris, 2. Peer Wms. 561.

Caſe 139.

Plunkett *againſt* Gillmore.

An action on the caſe lies for conſpiring to cauſe *a tavern* to be reputed *a bawdy-houſe*.

S. C. Fort. 211. 1. Com. Dig. "Action for "Conſpiracy" (A.).

THIS was a ſpecial action on the caſe brought by the plaintiff in *Ireland*.

The declaration was, that he (the plaintiff) kept A TAVERN *in Dublin*, and that the defendant procured a ſoldier to dreſs himſelf in woman's clothes, and ſo to perſonate a woman, and then to come with another ſoldier to the houſe of the plaintiff, and to call for wine, and ſoon afterwards he (the defendant) procured another ſoldier to come into the room where the two were drinking, and to claim that ſoldier in woman's clothes to be his wife, and by this means to quarrel with the other, and to cry up THE TAVERN to be *a bawdy-houſe*, which brought the mob together, who were likely to break his (the plaintiff's) windows, and that there is a cuſtom in *Dublin* to cart bawds.

Upon

Upon the general iſſue pleaded, the plaintiff had a verdict and judgment in the king's bench court in *Ireland*; and a writ of error brought in this court. PLUNKETT *againſt* GILLMORE.

IT WAS SAID *by the plaintiff in error's Counſel*, that it did not appear by the declaration, that the plaintiff had any cauſe of action, for he only ſet forth, that the mob were likely to break his windows, which is no poſitive allegation that they did break them, and therefore the judgment ought to be reverſed.

But THE COURT, without any further argument, affirmed the judgment, for the declaration ſet forth a cuſtom in *Dublin* for bawds to be carted; therefore to repreſent A TAVERN to be a *bawdy-houſe*, may be injurious to his trade as a vintner, by which he may be very much damnified, and by conſequence has a good cauſe of action.

The King *againſt* The Corporation of Penryn in Cornwall. Caſe 140.

UPON A MOTION for two informations in nature of *quo warranto* againſt two perſons who pretended to be mayors of this corporation, and upon an affidavit, that * the mayor in poſſeſſion was not duly elected by a majority of the capital burgeſſes, there were two rules made, that ſuch informations ſhould go againſt thoſe two perſons, unleſs each of them ſhould ſhew ſome good cauſe to the contrary; which rules were afterwards made abſolute againſt both the ſaid perſons.

If two informations *quo warranto* be filed, the firſt againſt the mayor *de facto*, and another againſt a burgeſs who voted for him, the ſecond information ſhall be firſt tried.

Another motion for the like informations againſt two other perſons who pretended to be capital burgeſſes of the ſaid corporation, but were not, for that one of them had not taken the oaths to the Government *(a)*, and the other was amoved from his office above two years laſt paſt, and yet both of them voted at the election of the mayor in poſſeſſion, by whoſe votes he had a majority, was alſo made abſolute. 1. Stra. 582.

The Counſel inſiſted that theſe two laſt informations might be firſt tried.

THE CHIEF JUSTICE was of opinion not to grant them, becauſe at the trial of the right of the mayor, the not taking the oaths by one of the burgeſſes, and the amotion of the other, might be given in evidence.

But the Counſel ſtill inſiſted, that there might be an inconveniency in this matter; for if the Judge who ſhall try the right of the mayor ſhould be of opinion, that thoſe things could not be given in evidence at ſuch trial, then the jury would certainly find againſt the right of one of the mayors; and it is probable, that though

(*a*) See the ſtatute 13. *Car.* 1. c. 1. Rex *v.* Williams, 1. Stra. 677. Rex *v.* Smith, 3. Term Rep. 573. and Rex *v.* Newling, 3. Term Rep. 310.

theſe

THE KING *against* THE CORPORATION OF PENRYN IN CORNWALL.

these two persons were not capital burgesses when the mayor was elected, for the reasons before-mentioned, yet they might have done some corporate acts as such, and so might be accounted capital burgesses *de facto*, and therefore their right as such may not be admitted to be litigated at the trial of the right of the mayor.

And of this opinion were THE OTHER JUDGES, *viz.* that at the trial of the elected, the right of the electors should not be inquired into or given in evidence (*a*); and therefore the most proper method was first to try the right of the electors upon an information in nature of a *quo warranto*, which ought to go against those two persons who pretended to be capital burgesses.

And thereupon it was granted to try their right first.

(*a*) The titles of persons who are *de facto* members of a corporation, cannot be impeached on the trial of a person elected by them, Cowp. 507. But where there is no other mode of trying the right of the *electors* in the first instance, the Court will grant an information against the *elected*, Rex *v.* Mein, 3. Term Rep. 595.

* [217]

Case 141.

* Biggs *against* Greenfield and Benger (*a*).

If trespass for taking and selling the plaintiff's goods be brought against two persons, and the one suffers judgment to go by default, and the other justifies *the taking* on a distress for rent by command of his co-defendant, and *the selling* by the licence of the plaintiff, and issue be taken on the licence and found for the defendant, the judgment suffered by default shall be arrested.

S.C. 2. Ld. Ray. 1372.
S. C. 1. Stra. 610.
2. Ld. Ray. 1080.

TRESPASS against two defendants, *for vi et armis* breaking and entering the plaintiff's house, and taking away and selling his goods, and for breaking and entering his close, taking his cattle, &c. and converting them to their own use.

Benger, one of the defendants, suffered judgment to go by default.

Greenfield, the other defendant, pleaded as to the *vi et armis* "not guilty," and, as to the other trespass, justified the entry and taking the cattle by distress for rent due and in arrear to *Benger*, reserved upon a lease made by him to the now plaintiff, by command from *Benger*, by licence of the plaintiff; and that he, the defendant *Greenfield*, sold the cattle which he had distrained for the rent, by the leave of the plaintiff himself, from whom the rent was due.

The plaintiff took issue upon his *licence* to sell, and the jury found for the defendant, *viz.* that he had leave to sell the cattle.

WEBB, *Serjeant*, moved in arrest of judgment for *Benger*:

FIRST, That the verdict having found the issue on *the licence* for the other defendant, it appears upon the record that the plaintiff has no cause of action, and consequently he can have no judgment against any defendant. In an action of covenant (*b*) against two for not building a house, judgment passed against one by default, and the other pleaded performance, and it was found for

(*a*) This was in Mich. Term, 11. Geo. according to Lord Raymond and Sir John Strange.

(*b*) 1. Lev 63.

him;

him; on which judgment was arreſted, becauſe it appears that there is no cauſe of action. In an action of treſpaſs (*a*) againſt two for taking a gun; one juſtifies the taking for the preſervation of the peace, and it was found for him; the other pleaded *not guilty*, and it was found for the plaintiff; and he had judgment, for the taking ſhall be intended at another time without cauſe; but otherwiſe where one defendant juſtifies by gift of the goods; for that ſhews the plaintiff can have no cauſe of action (*b*). If ſeveral commit a treſpaſs, the ſame is joint or ſeveral at the will of him to whom the wrong is done, yet if he releaſe to one of them, all are diſcharged (*c*). It muſt appear upon the record that the plaintiff has cauſe of action; and it will not be ſufficient to ſay that it does not appear that he has no cauſe of action The licence is the ſame as a releaſe or a grant, for it equally deſtroys all cauſe of action.

Brons *againſt* Greenfield and Benger.

SECONDLY, This plea is ill for another reaſon, *viz.* becauſe it is not averred, that the leaſe upon which this rent * was reſerved, and for which the diſtreſs was taken, is ſtill ſubſiſting, and not expired; for if it be, then the diſtreſs was unlawful. * [218]

ON THE OTHER SIDE *it was argued*, that this juſtification was entire, and went to the whole treſpaſs, for the entering and taking the cattle is juſtified by a diſtreſs for rent, which part of the plea was admitted on all ſides to be good, and the converſion was anſwered by the licence which the jury had found; ſo that upon this record it does not appear, that the plaintiff had any cauſe of action, therefore the defendant muſt have judgment. It is true, the other ſide would diſtinguiſh this caſe from an action of debt or covenant; but yet where on the record itſelf it appears that the plaintiff in treſpaſs had no cauſe of action, it is the ſame thing; and though it ſhould be admitted, that this plea does not cover the whole action, yet the jury having given entire damages for the converſion as well as for the entry, the plaintiff can never have judgment on this record.

THE COURT. This caſe of *a licence* cannot be diſtinguiſhed from a gift of goods, or a releaſe, which deſtroys the cauſe of action as to all the defendants; wherefore let judgment be arreſted as to both.

(*a*) Cro. Jac. 134.
(*b*) Year Book 7. *Edw.* 4. pl. 18. 2. Co. 52. 8. Co. 120.
(*c*) Co. Lit. 232. a.

Mordant *againſt* Small. Caſe 142.

ERROR OF A JUDGMENT given in the court of common pleas in an action of covenant brought by the plaintiff on a deed-poll.

If *A.* covenant to pay ſo much money on *B.* transferring ſo much ſtock to him, or ſome other perſon, at the requeſt of *A.* on or before ſuch a day and at ſuch a place, and to receive the ſtock at the ſaid time and place; a declaration in covenant by *B.* muſt ſtate *a requeſt* to transfer; the fixed hours on which ſuch transfers are made; and that he was at the place on the *laſt inſtant* of the time, ready to make the transfer.—Ante, 40. 68. 305. Poſt. 294.

MORDANT *againſt* SMALL.

The plaintiff in the action declared, that in and by the ſaid deed, the defendant covenanted to pay fifteen thouſand pounds on the plaintiff's transferring two hundred pounds *South Sea* ſtock to the defendant, or other perſon, at the requeſt of the defendant, on or before the twenty-eighth day of *September*, and at ſuch a place, at which time and place the defendant covenanted to receive the ſtock. The plaintiff then ſets forth the cuſtom of that Company to transfer the ſtock at the *South-Sea Houſe*, in ſuch a method and at ſuch hours, and avers, that he was at the *South-Sea Houſe*, &c. on the twenty-eighth day of *September*, *et paratus fuit et obtulit* then and there to transfer the ſtock, and ſtayed there from nine of the clock in the morning of that day, until three of the clock in the afternoon, and until the books were ſhut; and that the manner of transferring is by ſigning the name in the books of the Company, &c. but that the defendant, or any other perſon for him, was not there to receive or accept the ſaid ſtock, and to pay the money, *ad damnum*, &c.

And upon a demurrer to this declaration, judgment was given
* [219] in * the court of common pleas for the plaintiff.

LEIGH, *for the plaintiff in error*, now argued that the declaration was inſufficient.

FIRST, The tender is ill, for it is not ſhewed which were the uſual hours for transferring; ſo that it does not appear that the tender was made within the uſual hours of transferring. In the caſe of *Colebourn v. Davies* (*a*) a tender was pleaded to be made *ſecundum uſuales regulas et ordinationes in hujuſmodi caſu edit. et proviſ.* which the Court inclined to be ill, ſo that the plaintiff diſcontinued.

SECONDLY, The tender ought to have been made the laſt inſtant of the time.

THIRDLY, The plaintiff ought to have ſigned the transfer books; a *paratus fuit et obtulit* is not ſufficient.

FOURTHLY, By the contract the defendant is left at liberty whether he will take the ſtock or not; for without his requeſt he cannot be obliged to acceptance; and it not being averred that he made a requeſt, no action lies.

REEVE *contra*.

FIRST, The plaintiff was at the *South-Sea Houſe* to the ſhutting of the books; ſo that the particular hours for transferring were immaterial.

SECONDLY, If the plaintiff was there the whole time, he muſt have been there the laſt inſtant of the time.

THIRDLY, Signing the transfer is making an actual transfer, which is unneceſſary where the defendant does not appear.

(*a*)

FOURTHLY,

FOURTHLY, Such conſtruction will overthrow the whole contract: "on the requeſt of the defendant," being words repugnant, ought to be rejected.

PRATT, *Chief Juſtice.* Suppoſe the plaintiff made a tender at ten of the clock, then went away, and in the mean time the defendant came expecting the transfer, would that be a good tender? No certainly: therefore the plaintiff ought to have pleaded a tender the laſt inſtant when the defendant was bound to attend in order for an acceptance.

FORTESCUE, *Juſtice.*—FIRST, It ought to appear that the cuſtom and uſage was to transfer between the hours of nine and three: Such preciſeneſs is not requiſite in caſe of a common law tender, becauſe every perſon is acquainted with the common-law; but the caſe is different where a tender is to be regulated by the uſage and cuſtoms of a private corporation. I think it ought to have been averred what were the uſual hours of transferring. This was one of the points adjudged in the caſe of *Lancaſhire v. Killingworth* (*a*).

SECONDLY, The tender is alledged to be made on the 28th of *September*; ſo it may be concluded not to be made within the proper hours for transferring.

THIRDLY, There is no neceſſity to fill up the transfer: ſo reſolved in the caſe of *Blackwell v. Naſh* (*b*), ſuch transfer would be idle, if the party did not come to accept it. In the caſe of a covenant to execute a deed, the party muſt prepare the deed, get it ingroſſed and ſealed; but need not execute it, unleſs the covenantee be ready to accept it.

FOURTHLY, By the words of this contract the firſt act lies on the defendant, *viz.* to requeſt the transfer.

RAYMOND, *Juſtice.* It is a fooliſh agreement leaving the defendant at liberty to proceed in the bargain or not; agreements are to be guided by the words; the tender, not being made at the laſt inſtant, ſeems ill.

Adjournatur (*c*).

(*a*) 2. Salk. 623. 3. Salk. 342. 12. Mod. 529. 1. Ld. Ray. 686. Comy. Rep. 116.

(*b*) Ante, 105. S. C. 1. Stra. 535.

(*c*) See Warren *v.* Conſett, ante, 107. Bullock *v.* Noke, Stra. 579. Duke of Rutland *v.* Hodgſon, Stra. 777. Thornton *v.* Moulton, Stra. 533. Bowles *v.* Bridges, 2. Stra. 832. Clark *v.* Tyſon, 1. Stra. 504. Menet *v.* Rane, Stra. 458. Rhodes *v.* Lovit, Bunb. 70.

* [220]

* Pocklington *againſt* Hatton.

Caſe 143.

SIR THOMAS HATTON, the teſtator, made a will in favour of the defendant, and afterwards purchaſed more lands, and then he made a codicil, and diſpoſed ſome part of his perſonal eſtate, but did not mention the purchaſed lands.

Cro. Car. 342. Jones, 331. 7. Mod. 53. 64. 117. Ld. Ray. 62. Stra. 691. 1105. 1142. 2. Bac. Abr. "Bill of Exceptions" (A.).

POCKLINGTON *against* HATTON.

After the death of the teſtator, his heir at law, who was the leſſor of the plaintiff, brought an ejectment; and THE JUDGE who tried the cauſe being of opinion for the plaintiff, the Counſel for the defendant tendered *a bill of exceptions*, which, as drawn up, and ſigned by the Counſel on both ſides, the Judge refuſed to ſeal; and thereupon the jury, by his directions, found a general verdict for the plaintiff.

And now, upon an affidavit made of this matter, the Court was moved, that all the proceedings might be ſet aſide, and that the plaintiff, if he thought fit, might bring a new ejectment, or, at leaſt, that the Court would ſtay all farther proceedings in the cauſe, until the *bill of exceptions* was ſigned by the Judge.

IT WAS INSISTED *for the plaintiff*, that the judgment was ſigned, and the record removed by the defendant, who had brought a writ of error in THE EXCHEQUER-CHAMBER, ſo that the Court could not make any rule in this cauſe, and that the defendant made this motion for no other purpoſe than that the Court would allow him time to aſſign errors, becauſe the Judge had refuſed to ſign the *bill of exceptions*.

But ſince the plaintiff had a verdict and judgment, and the defendant was in poſſeſſion, it was propoſed that he ſhould deliver up the poſſeſſion to the plaintiff; and then, if the defendant thought himſelf wronged, he might be plaintiff in a new ejectment to recover the poſſeſſion again.

It was objected againſt this propoſal, that if the now defendant ſhould deliver up the poſſeſſion, and be made plaintiff in a new ejectment, there were ſeveral old terms ſtill ſubſiſting which might ſtand in his way, and that the writ of error in THE EXCHEQUER-CHAMBER was not yet returned, ſo that this cauſe was ſtill under the controul of this court.

THE COURT was of opinion to grant *a new trial*, if the defendant had made this motion in time, *viz.* before * the judgment was ſigned, but not after, and much leſs after a writ of error brought in the exchequer-chamber. * [221]

And as to the ſtaying the proceedings until the Judge who tried the cauſe ſhould ſign *a bill of exception*, that may be for ever, becauſe he may never ſign them.

PRATT, *Chief Juſtice*. It has been reſolved in this court, in my Lord Chief Juſtice HOLT's time, that a Judge is not obliged to ſign *a bill of exceptions*, unleſs offered at the trial, and drawn up according to the minutes then taken.

The defendant's Counſel, perceiving the opinion of the Court, offered to deliver up the poſſeſſion to the plaintiff, ſo as he would enter into a rule of court not to ſet up any old terms for years, or incumbrances againſt the defendant's title, and that he would receive a declaration in ejectment immediately, and plead to iſſue, ſo

as

as a trial might be made at the next aſſizes; and if a verdict ſhould be found againſt him, then to quit the poſſeſſion within ten days after the trial; to all which the now plaintiff agreed. POCKLINGTON *againſt* HATTON.

And at the next aſſizes this ejectment was tried, and the jury found a verdict for the defendant, who was heir at law, and that to the ſatisfaction of the Judge who tried the cauſe.

In *Eaſter Term* following the plaintiff moved for *a new trial*, and to ſet aſide the laſt verdict, becauſe the jury found a *general verdict*, when it was required that they would find the matter *ſpecially*.

And accordingly it was ſet aſide.

And in *Trinity Term* the Court was moved for a good jury, and that *a ſpecial verdict* might be found, which THE COURT thought neceſſary to determine the law in this matter.

And a rule was made for a good jury.

HILARY TERM,

The Tenth of George the Firſt,

IN

The Common Pleas.

Sir Peter King, *Knt. Chief Juſtice.*
Sir Francis Page, *Knt.*
Alexander Denton, *Eſq.* } *Juſtices.*
Robert Price, *Eſq.*
Sir Philip Yorke, *Knt. Attorney General.*
Sir Clement Wearg, *Knt. Solicitor General.*

Wright *againſt* Horne.

Caſe 144.

EJECTMENT.—A teſtator deviſed "all that my meſſuage "in *Edmonton* to *Francis Carter* and his heirs;" and "all "the reſt and reſidue of my meſſuages, lands, tenements "and hereditaments in *Edmonton*, *Enfield*, and elſewhere, to *John* "*Lammas*, his heirs and aſſigns for ever."

If a teſtator deviſe "all that "my meſſuage "in *Edmonton* to "*A.* and his "heirs," and "all the reſt and "reſidue of my "meſſuages, "lands, tene-"ments and he-"reditaments, "in *Edmonton*, "andelſewhere, "to *B.* and "his heirs for "ever;" and *A.* die in the life-time of the teſtator; the meſſuage in *Edmonton* ſhall not go to *B.* but to the heir at law of the teſtator.—12. Mod. 592. 1. Wilſ. 333. Cowp. 299.

After the making of this will, *Francis Carter*, the deviſee, died in the life-time of the teſtator, ſo that this became a lapſed legacy by his death.

The ſole queſtion was, Whether this latter clauſe of * the will would carry over the lapſed legacy to *John Lammas*, the reſiduary legatee, or whether it ſhould deſcend to the heir at law of the teſtator?

It was admitted that ſuch a reſiduary clauſe would carry over a lapſed legacy to a reſiduary legatee from *an executor*; but the doubt was, whether it would carry it from *the heir at law.*

THOSE WHO ARGUED that it would not, cited many authorities in the books, where it is expreſsly adjudged, that an heir at law ſhall not be diſinherited, but by very plain and clear words, or by

WRIGHT *againſt* HORNE.

ſome neceſſary implication from expreſs words, which ſhew that the teſtator did intend to diſinherit him (*a*). Now, in the conſtruction of wills, the courts of law always conſider the intention of the teſtator, which they collect out of his words: as for inſtance, in the caſe of *Cranmer v. Webb (b)*, upon the will of *Sir Henry Wood*, who deviſed, that if his daughter married *the Duke of &c.* then his lands ſhould be and remain to her and the heirs of her body; but that if ſhe died without iſſue, then, after her death and the death of *the Duke*, they ſhould be and remain to *Sir Cæſar Cranmer*, *&c.*; ſhe died without iſſue, and *the Duke* ſurvived, and *Sir Cæſar* and *Mr. Webb* married her ſiſters; and it was adjudged, that they ſhould take by moieties during *the Duke's* life. So where a man deviſed his eſtate to his eldeſt ſon, and to three more and their heirs, and that one of thoſe three ſhould have all the profits during life; and it being proved that the deviſe was only *in truſt* for thoſe three, it was adjudged *(c)*, that they ſhould releaſe to the ſon, who was heir at law. So in *Chancey's Caſe (d)*, in *February* laſt, where the teſtator, after a deviſe of ſeveral pecuniary legacies, added theſe words, "and all the reſt of my goods and chattels, "and eſtate whatſoever, I deviſe to my wife, &c." it was decreed, that the equity of redemption of a copyhold of inheritance (of him the teſtator) did not paſs by that clauſe to the wife, but that it ſhould go to the heir at law. And ſo it was where the teſtator deviſed lands held of ſuch a manor to his wife for life, and likewiſe the ſervices to her for fifteen years, and all the manor to *T. S.* after the death of the wife; it was adjudged *(e)*, that the heir at law had a good title to the ſervices after the fifteen years, and during the life of the wife. * There is a caſe in *Leonard (f)*, where there ſeems to be a contrary reſolution againſt the heir at law, but upon conſideration thereof it will appear to be very different from the principal caſe: it was a deviſe of lands in *Gages*, for the erecting and maintaining a free-ſchool, and a deviſe of other lands to *T. S.* and his heirs, and all his other lands to *T. French*, his heirs and aſſigns for ever; in this caſe it was adjudged, that the deviſe of the lands in *Gages* was void, becauſe there was no perſon to take by that deviſe, but that it paſſed to *French* by thoſe general words, "all other his lands to *French*," though the intention of the teſtator could not be collected out of the words of this will, that they ſhould paſs to him. Beſides, this caſe ſtands ſingly by itſelf, and there is not another in all the books to ſupport it; and upon due conſideration had, there is ſome difference between that and the principal caſe; for in *French's Caſe*, the deviſe was void *ab initio*, but here it was good at the time of the making this will, and the teſtator himſelf, without a prophetick ſpirit, could not know but that it would be good at the time of his death. If

* [223]

(*a*) Lane, 57. Raym. 453. T. Jones, 107. 114. Cro. Car. 158. 369. 447. Cro. Eliz. 742. Dyer, 371. 12. Mod. 596. 2. Vern. 571. Prec. Chan. 384 And ſee Denn v. Gaſkin, Cowp. 661.

(*b*) Show. Parl. Caſ. 87. 2. Vern. 371.

(*c*) Fitz. Abr. "Deviſe" 22.

(*d*) The caſe of Wells v. Edwards.

(*e*) Moor, 7. Roll. Abr. 844.

(*f*) Bennet v. French, 1. Leon. 251.

it

it ſhould be objected, that theſe lands may paſs to *Lammas* by way of executory deviſe, upon the contingency that *Carter* might die in the life-time of the teſtator, which he might very well intend, without a prophetick ſpirit; the anſwer is, that for eſtates to paſs by executory deviſe, is only an indulgence allowed by the law, where otherwiſe the words of the will would be void, which is not applicable to the preſent caſe; becauſe there are other lands mentioned in this will ſufficient to ſatisfy the words. Neither are theſe caſes *(a)*, where it appears on the face of the will, that the teſtator had lands to diſpoſe at the time the will was made, applicable to this caſe, becauſe here the teſtator had not theſe lands to diſpoſe at the time of making his will; for the words "all the "reſt and reſidue of his lands to *John Lammas*," are excluſive, and ſhall only paſs thoſe lands which were not before deviſed; but the lands now in queſtion were before deviſed to *Carter*; and he being dead in the life-time of the teſtator, it is impoſſible for him to take by this deviſe, therefore they ſhall deſcend to the heir at law.

Allen, 28. 2. Vent. 285. 1. Lev. Salk. 239. pl. 18.

IT WAS ARGUED *for John Lammas*, the reſiduary legatee, that by the deviſe of "all the reſt and reſidue of his lands to him and "his heirs," thoſe very lands which were deviſed * to *Carter*, and which by his death in the life-time of the teſtator became a lapſed legacy, were legally veſted in the ſaid *Lammas*; ſo it ſeems plain, that all the reſt and reſidue of his eſtate, which the teſtator had at the time of making his will, did paſs to him by thoſe words; and why ſhould not that eſtate, which by poſſibility he might have in his life-time, paſs to the ſaid *Lammas* by way of executory deviſe, upon a contingency that *Carter* might die (as he did) in the life-time of the teſtator, eſpecially ſince by the deviſe to *Carter*, the heir at law was diſinherited. It is like that caſe, where the teſtator deviſed his lands to two and their heirs, and one of them afterwards died, living the ſaid teſtator, the other ſhall have the whole, though by the words of the will the teſtator intended him only a moiety, but he ſhall have the other moiety before the heir at law, becauſe it is very plain the teſtator intended to paſs all his eſtate from him. So where the deviſe was to *T. S.* and his heirs, "and if he died "without iſſue, then to *M. H.* in fee, and afterwards *T. S.* died in the life-time of the teſtator, but left iſſue; adjudged *(b)*, this was a lapſed legacy as to *T. S.* and that the lands ſhould paſs to *M. H.* and not to the iſſue of *T. S.* becauſe ſuch iſſue could not take by this deviſe. Now in the principal caſe, the teſtator intended that *Lammas* ſhould take what he had not before deviſed to *Carter*; and his intention is clear without any ſpirit of prophecy, that if *Carter* had lived, the heir at law had been effectually diſinherited; therefore theſe general words, "all the reſt and reſidue "of my lands to *Lammas*," being ſufficient to paſs them to him, and agreeable to the intention of the teſtator himſelf, they muſt

* [224]

(a) Allen, 28. 2. Vent. 285. 1. Salk. 239. *(b)* Cro. Eliz. 423.

neceſſarily

WRIGHT against HORNE.

neceſſarily paſs to him. As to that caſe between *Wells v. Edwards* (*a*), it is no authority againſt that conſtruction which hath been made in the principal caſe, becauſe in that caſe the will began with pecuniary legacies, which ſhews that the teſtator did not intend to paſs the equity of redemption of a mortgage of a copyhold of inheritance to his wife, and for that reaſon it went to the heir at law.

THE COURT were of different opinions, there being no caſe in all the books which comes near it, except that in *Leonard's Reports* (*b*), which ought to be well conſidered.

*[225] THE CHIEF JUSTICE was of opinion for the heir at law againſt the reſiduary legatee; becauſe theſe words, * "all the reſt and "reſidue of my lands to *John Lammas*," were excluſive of the lands deviſed to *Carter*; ſo that by his death in the life time of the teſtator, the legacy to him being lapſed, thoſe lands muſt deſcend to the heir at law.

ANOTHER JUDGE was of a contrary opinion, *viz.* that it ſeemed very clear to him, that the teſtator intended to diſinherit the heir.

THE CHIEF JUSTICE likewiſe agreed in this opinion, as to the lands deviſed to *Carter*; but that it does not follow, that becauſe he had diſinherited him of the lands in relation to *Carter*, therefore he intended to diſinherit him of thoſe lands which he had deviſed to *Lammas*; ſo that this matter is fit to be conſidered.

And ſo it was adjourned (*c*).

(*a*) Ante, 222, 223.

(*b*) 1. Leon. 251.

(*c*) It is ſaid, S. C. Forteſ. 182. the Court held, that the deviſe of "all the "reſt and reſidue of my meſſuages, "lands, &c." did not convey what was expreſsly deviſed before, for that wills muſt be conſtrued according to the intent of the teſtator at the time of making the will; that his intention was to give his whole eſtate in that meſſuage to *Carter* in fee; that at the time the will was made he had no "reſt and reſidue" left in that meſſuage; and that the deviſe to *Carter* being void, the houſe paſſed to the heir at law, and not to *John Lammas*.—And in Eaſter Term, 2. *Geo.* 2. in the caſe of Roe *v.* Fludd, where the teſtator deviſed land to *R. B.* in fee, and all the reſt and reſidue of his eſtate, real and perſonal, to *E. F.* in fee; and *R. B.* died in the time of the teſtator, it was held on the authority of the above caſe, that *E. F.* could not take the land deviſed to *R. B.* becauſe that was not any part of the reſt and reſidue of the teſtator at the time the will was made.—Forteſ. 184. See Goodright *v.* Opie, ante, 124.

HILARY TERM,

The Tenth of George the Firſt,

IN

The King's Bench,

Sir John Pratt, *Knt. Chief Juſtice.*

Sir Lyttleton Powis, *Knt.*
Sir John Forteſcue Aland, *Knt.* } *Juſtices.*
Sir Robert Raymond, *Knt.*

Sir Philip Yorke, *Knt. Attorney General.*
Sir Clement Wearg, *Knt. Solicitor General.*

Anonymous.

Caſe 145.

A *ſcire facias* taken out before, may be executed after, the death of the defendant without ſuing out a *ſcire facias.*

2. Vent. 218.
1. Sid. 29.
1. Term Rep. 361.
Sellon's Pract. 545.

AN EXECUTION was taken out againſt the teſtator in his life-time, and executed after his deceaſe. The writ was returnable *octab. Martini*, and executed on the ſixteenth day of *November*, which was two days before the return was out.

IT WAS OBJECTED, that this execution was ill, being executed after the teſtator's death, and without any *ſcire facias* brought, to ſhew cauſe *quare executionem non habet.*

THE COURT. The execution being ſued out before the teſtator's death may be executed afterwards without a *ſcire facias*, as was reſolved in *Dr. Needham's Caſe* (*a*); and it may be executed at any time before the return of the writ; nay, an execution of it on the very day that it is returnable, is good; and if it be executed in the Vacation, it ſhall refer to the antecedent Term, and ſo it ſhall, if it be executed in Term-time: ſo is the caſe of *Parker v. Moſs* (*b*), which was determined in *Eaſter Term*, in the thirty-ſecond year of *Queen Elizabeth.*

(*a*) 12. Mod. 5.

(*b*) Cro. Eliz. 181.

Crundell

Caſe 146.

Crundell *againſt* Bodily.

If, after a verdict for the defendant in ejectment, and coſts taxed, the plaintiff bring error, and pending it a new ejectment, the ſecond action ſhall be ſtayed until the coſts in the firſt are paid.

EJECTMENT.—The defendant had a verdict and judgment, and coſts taxed, and then the plaintiff brought a writ of error in THE EXCHEQUER-CHAMBER, and pending that writ he brought a new ejectment.

IT WAS MOVED, that he might not proceed on this ejectment until he had paid the coſts of the firſt.

* IT WAS INSISTED *for the plaintiff*, that he did not bring this writ of error to avoid the payment of the coſts, neither was the verdict and judgment againſt him in the firſt ejectment any bar to his bringing another ejectment. It is true, it may be evidence againſt him, but it is no bar; therefore this motion comes too ſoon, and ought to be ſuſpended until the errors aſſigned are determined in THE EXCHEQUER-CHAMBER, and the judgment either affirmed or reverſed.

* [226]

S. C. Stra. 554. Salk. 255. 4. Mod. 374. 1. Bac. Abr. "Coſts" (H.).

THE COURT thought it hard that the defendant ſhould be doubly vexed by the proceedings on the writ of error, and by a new ejectment; therefore made a rule, that if the plaintiff proceed on the ejectment, he ſhall pay the coſts of the firſt, otherwiſe he ſhall not proceed on the ſecond *(a)*.

(a) Roberts *v.* Cook, 4. Mod. 379. Short *v.* King, 1. Stra. 681. Parker *v.* Troubleſome, 2. Stra. 1099. Ginger *v.* Barnardiſton, 2. Bl. Rep. 904. Chadwick *v.* Law, 2. Bl. Rep. 1158. 1184. Hamilton *v.* Hatherley, 2. Stra. 1152. and ſee Hullock on Coſts, 445 to 467.

Caſe 147.

The King *againſt* Colvin.

An attachment lies againſt a *gaoler* for corruptly refuſing to return a *habeas corpus*.

UPON A MOTION for *an attachment* againſt the defendant, who is a gaoler, for denying to return a *habeas corpus* directed to him, and for extorting a note from the proſecutor, then in his cuſtody, ſo as by menaces and dureſs he was forced to comply, and give the note for payment of money to the gaoler;

2. Rell. Abr. 32. 2. Show. 172. 2. Jones, 178. 2. Hawk. P. C. ch. 22. ſ. 31.

THE COURT made a rule, that he ſhould ſhew cauſe why *an attachment* ſhould not go.

An attachment lies againſt an *effoiciat* for altering a record. 2. Hawk. P. C. ch. 22. ſ. 12.

NOTA. An attachment iſſued out againſt AN ASSOCIATE for mending a record after a motion in arreſt of judgment for the ſame fault, which he mended; but upon his making the record as it was before it was mended, and paying coſts, the Court, *ex gratiâ*, ſuperſeded the attachment.

Caſe 148.

Taylor *againſt* Lake.

A *diſtringas* ſtamped before *the joſtea* is returned, is good. S.C. 1. Stra. 575.

A MOTION was made to ſet aſide two verdicts, becauſe the *diſtringas's* were not ſtamped purſuant to 9. & 10. *Will.* 3. ch. 25. ſ. 59. ſo that the trials were void by the ſtamp-act.

But

But the ſolicitor having got thoſe writs ſtamped before THE POSTEA was brought into court, this motion was rejected, for it did not appear to them but that they were ſtamped; and they could not take any notice, whether they were ſtamped, or not, at the aſſizes; if they were not, the defendant ſhould have taken notice, and inſiſted on it at that time.

TAYLOR *againſt* LAKE.

Anonymous.

Caſe 149.

IT WAS HELD *by the Court*, that it is not ſufficient to deliver a copy of a declaration to the turnkey or gaoler * where the defendant is in cuſtody *(a)*, unleſs the declaration is firſt filed in the office; and therefore where a judgment was had upon a declaration ſo delivered, it was ſet aſide by the Court.

Where a defendant is in actual cuſtody, *the bill* muſt be filed before a copy of it is delivered to the gaoler.

And if judgment be regularly obtained againſt ſuch defendant, the plaintiff muſt charge him in execution within two Terms afterwards, and not after thoſe two Terms are expired, or if he be charged afterwards, the Court will diſcharge him with coſts.

Tidd's Pract. 188. 5. Com. Dig. "Pleader" (C. 4.).

(a) See 4. & 5. *Will. & Mary*, c. 21.

The King *againſt* Pepper.

Caſe 150.

A RULE of this court was made in the fifteenth year of *Charles the Second*, that the plaintiff ſhould ſet forth in his writ or bill an *ac etiam* of the ſum for which he expected the defendant ſhould give bail; and that if he brought an action without any cauſe, on purpoſe to hold the defendant to ſpecial bail, he ſhould be puniſhed.

An *attachment* does not lie for inſerting a larger ſum in the *ac etiam* than is due, in order to ouſt the party of bail.

THE COURT was now moved for *an attachment* againſt *Pepper*, who brought an action, with an *ac etiam billæ* in a great ſum, to hold the defendant to ſpecial bail, where nothing was due, as it appeared before a Judge, the plaintiff being ſummoned before him to ſhew his cauſe of action; and this was ſaid to be an abuſe of the proceſs of this court, and conſequently a contempt.

3. Lev. 311. Lutw. 1572. 1. Salk. 14. 1. Sid. 424. 1. Mod. 4.

THE COURT held that this was not ſuch *a contempt* as to iſſue out or grant *an attachment* againſt the plaintiff, but directed, that if the defendant was damnified, he might bring his action.

Andrews *againſt* Harper.

Caſe 151.

IN the court of common pleas there is but one *ſcire facias* againſt the bail, and upon a *nihil* returned there is execution.

Where the ſheriff returns *nihil* upon a *ſcire facias*, another *ſcire facias* ſhall be awarded.

But in the court of king's bench, the courſe is to have two *ſcire facias's* againſt the bail; a *ſcire facias*, and an *alias ſcire facias*; but both muſt not be ſued out together, as formerly; for the firſt

Dyer, 168. 172. 201. 5. Com. Dig. "Pleader" (3. L. 9.). 2. Inſt. 472.

ſhall

ANDREWS *againſt* HARPER.

ſhall be duly returned before the *alias ſcire facias* is ſued out, which muſt bear *teſte* on the day of the return of the firſt; and there muſt be fifteen days incluſive, between the *teſte* of the firſt and the return of the *alias*.

In the principal caſe, THE COURT was moved to ſet aſide a judgment obtained againſt the bail * upon two *ſcire facias's* brought againſt them, becauſe it did not appear that the judgment was had on the return of *two nihils*.

*[228]

It was referred to THE MASTER to examine this matter.

Caſe 152.

Wadſworth *againſt* Handyſide.

If a bill be filed againſt a *member of parliament*, and he appears upon the *ſummons* and files *common bail*, and a declaration is not delivered within four days of the end of the Term, he ſhall have an *imparlance* until the next Term.

Tidd's Pract. 82. 84. Impey, 5th edit. 490.

THE DEFENDANT was a *member of parliament*, and appeared, and filed common bail.

IT WAS MOVED that he might have no *imparlance* over to the next Term. By the ſtatute 12. & 13. *Will.* 3. c. 3. it is enacted, "That actions may be brought in any of the courts in *Weſtminſter*, againſt any perſon entitled to privilege of parliament, immediately after the diſſolution or prorogation, until a new parliament, or the ſame is re-aſſumed, and immediately after an adjournment of both houſes for above fourteen days, until re-aſſumed; and that perſons having cauſe of action againſt any member of the houſe of commons, may have proceſs againſt him during the time aforeſaid, out of the ſaid courts, by ſummons, by diſtreſs infinite, or by original bill, ſummons, attachment, and diſtreſs infinite, till the defendant ſhall appear and file common bail, &c. (*a*)." This being a proceeding in a ſpecial manner directed by this ſtatute againſt *privileged perſons*, the uſual practice is, when an action is brought againſt ſuch *privileged perſon*, to file a bill in nature of a *ſpecial capias* againſt the defendant, and then to *ſummons* him; and if he appears upon ſuch *ſummons*, then the plaintiff may declare againſt him as *in cuſtodiâ mareſchalli*; to which declaration he ought to anſwer without any *imparlance*.

IT WAS INSISTED *for the defendant*, that this ſuit was againſt a *member of parliament*; that if he was not a *privileged perſon*, he might have *an imparlance*, of courſe, to the next Term, ſince the declaration againſt him was not delivered before the *morrow of All-Souls*; that if *a ſpecial original* is brought againſt a perſon who has no privilege, he muſt likewiſe have an imparlance of courſe; and that it would be a very proper method to leave thoſe who had no privilege, and thoſe who were privileged, upon the ſame footing. As to the act of parliament mentioned on the other ſide, it has no manner of influence on the practice of the Court; it only appoints a method to bring privileged perſons to appear. * But admitting that the plaintiff might proceed in this caſe as by *ſpecial original*, yet that would not be a reaſon againſt granting *an impar-*

*[229]

(*a*) 11. *Geo.* 2. c. 24.

lance,

lance, becauſe the *ſummons* is ſtill general, and ſo is the *capias*; and it is not the *ſpecial original*, but the ſpecial *capias* which haſtens the proceedings; and it would be very hard to take this as a caſe where a ſpecial *capias* is allowed to be the firſt *ſummons*; therefore it was inſiſted for the defendant, that he might have leave to imparl (*a*).

WADSWORTH *againſt* HANDYSIDE.

THE COURT was of opinion, that the proceedings in this caſe ſhould be like thoſe in moſt other caſes, and not be influenced by the ſtate of either party; and that if they are founded on a *ſpecial original*, then there lies *an imparlance* of courſe till the next Term.

(*a*) Skin. 2. Tidd's Pract. 242.

Long *againſt* Nixon.

Caſe 153.

THIS was an action brought in *London*; and the defendant moved the Court to change *the venue*.

A rule was made that it ſhould be changed.

The plaintiff now moved to diſcharge that rule.

The Court will not diſcharge a rule obtained on the common affidavit to change the *venue*, on the ground, that if the action be by *original*, the changing it will create a *variance*.

1. Will. 173. 2. Stra. 1162. 1202. 1. Com. Dig. "Action" (N. 13.).

IT WAS INSISTED *in behalf of the plaintiff*, that this is a tranſitory action, which the plaintiff might bring where he pleaſed; and that it was by the indulgence of the Court, and for the eaſe of the parties, that *venues* are, at any time, changed, and that it would be very inconvenient for the plaintiff if this *venue* ſhould be changed, becauſe the action being brought by *ſpecial original*, there would be *a variance* upon changing the *venue*, therefore it is convenient for the plaintiff, that the action ſhould be tried in *London*.

IT WAS SAID *for the defendant*, that though it might be convenient for the plaintiff, yet it might be otherwiſe for the defendant, to have this trial in *London*, and that there could be no inconvenience to the plaintiff, though the action was brought by *ſpecial original*, for ſuch actions are frequently brought in the court of common pleas, and there the *venues* are daily changed.

THE COURT would not diſcharge the rule for the changing *the venue*, for if they ſhould, then, where an action is laid in *London*, the *venue* would never be changed; and as to *the variance*, the defendant ſhall take no advantage of it, though the action was brought by ſpecial original.

The King *againſt* Burridge, the Mayor of Tiverton.

Caſe 154.

PRATT, *Chief Juſtice*. If an affidavit be laid before the Court of ſuſpicion that there will not be *a fair jury*, and the adverſe party will not conſent to *a good jury*, we will rule one without his conſent. It is done every day in the court of common pleas.

Rule for a jury without conſent.

EASTER

EASTER TERM,

The Tenth of George the Firſt,

IN

The King's Bench.

Sir John Pratt, *Knt. Chief Juſtice.*
Sir Lyttleton Powys, *Knt.*
Sir John Forteſcue Aland, *Knt.* } *Juſtices.*
Sir Robert Raymond, *Knt.*
Sir Philip Yorke, *Knt. Attorney General.*
Sir Clement Wearg, *Knt. Solicitor General.*

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* Knight *againſt* Cambridge. Caſe 155.

Hilary Term, 10. *Geo.* 1. *Roll* 375.

If the maſter of a ſhip, intending to avoid the payment of port duties, attempt to run her out of port, and is ſtopped, and the ſhip thereby forfeited, this is *barratry* in the maſter, and renders the underwriter of the ſhip liable, within the terms of a policy inſuring againſt the barratry of the maſter.

WRIT OF ERROR to reverſe a judgment given for the plaintiff in the common pleas in an action brought on A POLICY OF INSURANCE "againſt the perils of the "ſea, winds, pirates, and barratry of the maſter."

The declaration laid for breach, that the ſhip was loſt by the fraud and negligence of the maſter; and *non aſſumpſit* was pleaded.

A CASE was made at the trial, which ſhewed the policy of inſurance, which inſured the ſhip againſt all loſſes and misfortunes, and againſt barratry; and then ſhewed that the ſhip was loſt by the wilful fraud and direct negligence of the maſter.

The queſtion was, Whether ſuch loſs is within the policy?

IT WAS INSISTED *for the defendant*, that it was not.

FIRST, This verdict will not warrant this judgment, becauſe fraud is not within the general words of this inſurance, which, like other covenants, muſt have a reaſonable conſtruction. If a man ſell lands, with a covenant in the purchaſe-deed, for quiet enjoyment, "without any diſturbance, &c." certainly thoſe words muſt

S.C. 1. Stra. 581. S. C. 2. Ld. Ray. 1349. Cowp. 143. Park, 399.

…ful diſturbance" *(a)*.
…rticular ſignification.

…ned too general; for there are
…ich the inſurers are not obliged to
…n, that *negligence* is no *barratry*,
…which does not include a neglect; and
…ly againſt the maſter for any neglect;
…was a neglect in the maſter, yet if it be not
…the inſurers cannot be charged; and for theſe
…ought to be reverſed.

…THE OTHER SIDE *it was ſaid,*

First, That this policy of inſurance was drawn in as general words as could be invented. But it is not true, that it muſt be expounded as other covenants, and like the covenant for quiet enjoyment, which, though in general words, extends only to a legal diſturbance, and for very good reaſon; that being the diſturbance which is only intended: but it is otherwiſe in policies of inſurance, which were intended to encourage trade, and that merchants might venture more freely, becauſe if any loſs ſhould happen, they might bear it with more eaſe.

SECONDLY, That *barratry*, in its nature, is any kind of cheating, and the verdict finds that this ſhip was loſt *per fraudem et negligentiam* of the maſter; and it is generally known, that ſhips are never wilfully ſunk but after ſome barratry committed, for then they are deſtroyed to conceal the villainy, ſo that *fraus et negligentia* is a plain barratry within the words of this policy. Therefore ſince inſurances began and are upheld to encourage merchants to trade, and that the words of this policy are ſufficient to charge the inſurers, and there is no default in the merchant *(c)*, it is unreaſonable that the wilful default of the maſter ſhould avoid this inſurance; therefore the judgment ſhould be affirmed.

THE COURT. Every neglect of the maſter is not within this policy; and if he run away with the ſhip or embezzle the goods, the merchant may have an action againſt him: but yet he may provide againſt it in another manner, *viz.* by inſuring his ſhip and goods to ſecure himſelf againſt ſuch acts of barratry; for it is reaſonable that merchants who venture a large ſhare of their ſtocks ſhould ſecure themſelves in what manner they think proper againſt the barratry of the maſter, and all other frauds. "Barratry" is a word of more extenſive ſignification than only to include the maſ-

(*a*) Vaugh. 128. 2. Saund. 180.
(*b*) Molloy de Jure Maritimo, 282. f. 12. Grotius de Jure Holland.
(*c*) It is eſſential to barratry that the wrong be committed by the maſter and mariners againſt the owners, and therefore if the owner is privy to or cauſe the wrong, it is not that ſpecies of barratry that will render the underwriter liable, Nutt *v.* Bordiew, 1. Term Rep. 323. If the maſter is an owner, and commit barratry, the underwriters are not liable, Roſs *v.* Hunter, 4. Term Rep. 33. See alſo Elton *v.* Brogden, 2. Stra. 1264. Stamina *v.* Brown, 2. Stra. 1173. Vallegio *v.* Wheeler, Cowp. 143.

ter's

nning away with the ſhip: it may well include the loſs of by his fraud or negligence. KNIGHT *againſt* CAMBRIDGE.

LY, A breach aſſigned in the words of the covenant is here, *per barratriam magiſtri*, had been good; but it is y good to aſſign the breach in words tantamount. Where is difference between running away with a ſhip and ſinking it?

THE JUDGMENT was affirmed.

* [232]

* Wilkinſon *againſt* Meyer.

Caſe 156.

Tueſday, 28 *April* 1724.

AN ACTION OF COVENANT was brought upon an indenture, wherein the plaintiff covenanted to transfer, and the defendant to accept a transfer of ſo much SOUTH-SEA STOCK at any ſuch a time, and to pay ſo much money for the transfer.

This action was now brought for the money.

The defendant pleaded, that the contract was not regiſtered according to the ſtatute 7. *Geo.* 1. ſtat. 2 c. 8. ſ. 8. by which it is enacted, "that every contract for the ſale or purchaſe of ſubſcriptions or ſtock of the *South-Sea Company*, *&c.* ſhall be entered in books to be kept for that purpoſe by the Company, to whoſe capital ſuch ſtock or ſubſcription did belong, and in default of ſuch entry, every ſuch contract ſhall be void; and ſuch entries ſhall expreſs the names of the parties for whoſe uſe ſuch contracts were made, &c."

Iſſue was joined thereon; and at the trial at *niſi prius* A CASE was agreed to, which was as follows:

The plaintiff made an entry of the contract *verbatim*, and at the bottom thereof uſed theſe words, "this is for my proper uſe and "benefit, PHILIP WILKINSON." It was further ſtated, that no evidence was given to prove the contract to be made for the benefit of any other perſon.

The queſtion was, Whether this is a good regiſtry according to the directions of the act of 7. *Geo.* 1 c. 8. the plaintiff in regiſtring this contract not having expreſſed the names of the parties for whoſe uſe it was made, but only that it was for his own uſe?

STRANGE, *for the plaintiff*, argued, that this was a good regiſtring of the contract within the act, which was made on purpoſe to prevent doubtful ſuits, on account of ſo many perſons being made truſtees; and though it may be objected, that this regiſtring only ſhews who has the benefit of the contract then made, yet it was the intent of the Legiſlature, that contracts to be made at any time after ſhould be regiſtered, on purpoſe to ſhew who they were that had a right to the ſtock; and this is ſufficiently ſhewed by

The ſtatute of 7. *Geo.* 1. ſt. 2. c. 1. ſ. 8. which requires that every purchaſer of *South-Sea ſtock* "ſhall be entered and regiſtered in the books of theCompany, and expreſs the names of the parties for whoſe uſe or benefit ſuch contract was made," is ſufficiently complied with by enteringthe deed of contract *verbatim*, and ſubſcribing the entry thus, "*this is for my proper uſe and benefit A. B.*;" but in an action on this contract, the defendant may ſhew that the ſtock was for the uſe and benefit of another perſon.

S. C. 2. Ld. Ray. 1350.
S. C. 1. Stra. 585.
Ante, 173.

WILKINSON *againſt* MEYER.

regiſtring it as before-mentioned. It appears by this regiſtry that the plaintiff had both the legal and equitable right. The objection ariſes only from the difference of the words "were" and "is." The act requires the entry to expreſs "for whoſe uſe ſuch contracts *were* made;" and here it is entered, "this *is* for my uſe, "*P. W.*" But this act is not to be conſtrued ſtrictly to bar perſons of their right. Even in common law conveyances words of a paſt and preſent tenſe are uſed promiſcuouſly, and do not import a different conſtruction: as in giſts, "*procreatis*" ſhall extend to iſſues begotten afterwards, and "*procreandis*" to iſſues begotten before (*a*).

FAZAKERLEY *for the defendant*. The words of the act being plain, "that the entries, &c. ſhall expreſs the names of the parties "for whoſe uſe the contracts were made," ſuch an entry as in the principal caſe will not be good, for it is not within the ſtatute, that being made to quiet the minds of the people, and for that reaſon ſhould * have a favourable conſtruction: but the intent of the ſtatute is not anſwered by this ſort of regiſtring; for the entry that it was "for the plaintiff's own uſe," may be in truſt for A DIRECTOR of the Company at the time of making the contract, though it may be for his own uſe at the time of making the entry; and the act plainly imports, that the entry ſhould ſhew for whoſe uſe it was at the time of making the contract; for if it was to the uſe of any of the Directors, who by fraud had raiſed the value of the *South-Sea* ſtock, it would be void, and an action would lie againſt him for ſo much money received to the uſe of him who paid it. Now this ſtatute being made to diſcover the eſtates of thoſe who had cheated the people, and to quiet their minds, and to prevent the frauds of the Directors, that they might not for the time to come have any benefit of ſuch contract; it ought to have as liberal a conſtruction as the Legiſlature intended, therefore the entry ſhould ſhew for whoſe uſe this contract was made.

* [233]

TO WHICH *it was anſwered*, and admitted, that this ſtatute ought to be carried as far as poſſible, to obviate the frauds of the Directors; but there could be no fear in this caſe, that any of them could be concerned, becauſe this was a contract for *lottery annuities*, which the Directors always ſubſcribed in their own names, but not the *money-ſubſcriptions*.

THE COURT. The queſtions are, Whether this entry has complied with *the words* of the act? If not, then, Whether *the meaning* of the act be ſatisfied or not?

PRATT, *Chief Juſtice*, and THE COURT. The act intended that the defendant ſhould know what perſon had the equitable, and what perſon had the legal right to demand the money on the contract. The perſon is to regiſter firſt the name of the perſon intereſted and the contract. The act is not to be made uſe of as a ſnare to

(*a*) Co. Lit. 20. b.

intangle

intangle people's rights. If it was the plaintiff's contract when he regiſtered it, it ſhall be intended to have been his when the contract was made. The contract itſelf, which is entered *verbatim*, appears to be made to the plaintiff, and to be for his own uſe; and no evidence was given to the contrary. 3. *Lev.* 1. WILKINSON *againſt* MEYER.

Judgment was given for the plaintiff.

But on this judgment for the plaintiff, a writ of error was brought in THE EXCHEQUER-CHAMBER by the defendant; and in *Trinity Term* following, it was moved to amend * the *venire facias*; for this being an action of covenant, and the defendant having pleaded ſeveral pleas, and the plaintiff having replied to one, and demurred to the reſt, the *venire facias* was drawn in the uſual form, "*tam ad triandum exitum quàm ad inquirendum de* "*damnis*," theſe laſt words, "*ad inquirendum de damnis*" ought to be ſtruck out. Motion to amend a record. * [234]

TO WHICH *it was anſwered*, that if the Court ſhould give leave to amend this record after a writ of error brought, it is but reaſonable that the plaintiff in the original action ſhould pay coſts; for it is probable, that the writ of error was brought by the defendant for this very fault. 3. Lev. 361.

THE COUNSEL *for the defendant in error* thereupon offered to pay coſts, if the plaintiff would waive his writ of error, for then it will appear, that it was brought for this very fault; but if he would not waive it, then it muſt be brought for delay.

But he refuſing to waive it, the defendant had leave to amend without paying coſts.

Webſter *againſt* Geering. Caſe 157.

A MOTION was made to quaſh the proceedings againſt the bail, the plaintiff having declared for more than was contained under the *ac etiam* in the bill. To quaſh the proceedings againſt the bail.

ONE JUDGE replied, that in the caſe of *Wiatt v. Evans (a)*, in the year 1694, it was adjudged to be a diſcharge of the bail. S. C. 1. Bar. 77. Cro. Jac. 128. 630. 6. Mod. 266.

ANOTHER JUDGE ſaid, that in the court of common pleas it was held good *pro tanto*. 1. Bar. K. B. 25.

But there being two cauſes of this kind now depending, the proceedings were ſtayed in this cauſe until the point was reſolved in the others.

(*a*) 3. Salk. 55. pl. 2.

Caſe 158.

The King *againſt* Pindar.

In *quo warranto*, if the defendant be found *duly elected* but not *ſworn* into his office, judgment of *ouſter* ſhall be given.

UPON AN INFORMATION in the nature of a *quo warranto* againſt the defendant, for uſurping the office of mayor of the corporation of *Penryn* in *Cornwall*, the defendant pleaded, that he was *debitè electus*, and ſworn into the ſaid office, &c.

The plaintiff replied, that he was not elected, and ſworn *modo et formâ*, &c. as he had pleaded, and thereupon they were at iſſue.

The jury found that he was *duly elected*, but that he was not *duly ſworn* into the office, &c.

* [235]

S. C. Stra. 582. S. C. 2. Ld. Ray. 1447. Ante, 215. Poſt. 332. 334. Co. Ent. 527. 1. Show. 280. 4. Mod. 58. Cro. Jac. 260. 6. Com. Dig. "Quo War-ranto" (C. 5.)

Upon a motion to ſet aſide this * verdict, it was inſiſted, that he was not mayor until duly ſworn, and therefore that he had uſurped the office, and that judgment of *ouſter* ought to be given and entered againſt him.

BUT *on the other ſide* it was ſaid, that the election being found to be regular, the defendant was intitled to a *mandamus* to be ſworn; but if there is a general judgment of *ouſter* againſt him, in ſuch caſe he cannot have a *mandamus* to be ſworn by virtue of any precedent election; therefore it would be prejudicial that ſuch judgment ſhould be entered againſt him.

And there being no precedents in what manner it ſhould be entered, the Court was moved to give ſome directions therein, ſo as the entry of the judgment might not hinder the defendant from obtaining *a mandamus*.

THE COURT bid them enter their judgment according to law.

RAYMOND and FORTESCUE, *Juſtices*, thought it rightly entered.

REYNOLDS, *Juſtice*, doubted.

THE COURT gave judgment of *ouſter*, which was afterwards affirmed in the houſe of lords (*a*).

(*a*) See Rex v. Hearle, Stra. 625. 627.

Caſe 159.

The Pariſh of Buckington *againſt* The Pariſh of Shepton Bechamp.

Indentures of apprenticeſhip are not cancelled by the maſter becoming *a bankrupt*, or by his *delivering the indentures* to a perſon to whom the apprentice hires himſelf as a yearly ſervant.—8 C. Stra. 582. S. C. 2. Ld. Ray. 1552. Fort. 321. Foley, 229. Seſſ. Caſ. 278. Comb's Poor Laws, 3. vol. 578.

UPON A MOTION to quaſh an order of ſeſſions, the caſe was thus:

An order of two juſtices was made for removing *Richard Allen* from the pariſh of *Shepton-Bechamp* to the pariſh of *Buckington*. On appeal, the ſeſſions confirmed the order, but ſtated the caſe ſpecially—That *Richard Allen* was born at *Shepton-Bechamp*, but bound an apprentice at twelve years of age to *John Cary* at *Buckington*, where he lived forty days; but the maſter becoming a

bankrupt,

bankrupt, *Richard Allen* hired himſelf as a ſervant for a year to *Joſhua Glover* in *Buckington*, and ſerved accordingly; during which ſervice the apprenticeſhip expired, when *John Cary* delivered up the indentures to *Joſeph Glover*.

THE PARISH OF BUCKINGTON *againſt* THE PARISH OF SHEPTON-BECHAMP.

IT WAS INSISTED, that a hiring *de facto* will gain a ſettlement for a man, as well as a marriage *de facto* will gain dower for a woman.

TO WHICH *it was anſwered*, that this hiring could not gain any ſettlement, becauſe the indenture of apprenticeſhip was ſtill ſubſiſting, and could not be diſcharged but by ſome other deed, or by the ſeſſions, ſo that this was not a lawful hiring; and if ſo, then a ſervice for a year in purſuance of ſuch an illegal hiring, cannot gain a ſettlement.

THE COURT held, that the pauper was ſettled at the pariſh of *Buckington*, under the indentures of apprenticeſhip; for as they were not delivered up, or cancelled by the maſter becoming bankrupt, he had no power to hire himſelf to *Glover*.

And both the orders were confirmed.

* Anonymous.

Caſe 160.

A MOTION was made to ſtay the proceedings on a judgment, ſuggeſting, that part of the money was paid, and that the defendant was willing to pay the reſt into court.

To ſtay proceedings on a judgment, for that part of the money was paid. Poſt. 242. Cro. Eliz. 68. Stiles, 239. Moor, 677. 2. Ch. Rep. 58. Finch. Rep. 89. 1. Vern. 34. 468. 2. Vern. 606. Comb. 463. 12. Mod. 559.

To which it was replied, that what money the plaintiff had already received, was in diſcharge of ſome other debts between him and the defendant; but upon producing his receipt, it appeared to be paid indefinitely, *viz.* as ſo much due upon account.

THE COURT. Where a debtor owes money to his creditor upon ſeveral accounts, he may pay part, and apply it to any debt; but if the creditor deny that he received it in ſatisfaction of that debt, but upon ſome other account, then he has election to apply the payment to what debt he will (*a*); ſo where it appears that money is paid indefinitely, the creditor has election to declare on what account he received it (*b*). Therefore if the debtor in the principal caſe would have this payment applied to the judgment, upon equitable terms, he ſhould likewiſe pay or tender all the money due to the plaintiff on ſimple contract, or otherwiſe, as far as the penalty of the judgment covers ſuch debts; for this Court will not compel a creditor by judgment to accept a leſs ſum than is due on the judgment, upon the account of any former indefinite

(*a*) See Bois *v.* Cranfield, Stiles, 239. *contra*.

(*b*) See the caſe of Goddard *v.* Cox, 2. Stra. 1154.

ANONYMOUS. payments, when there were other accounts depending between the parties, unleſs the defendant will conſent to bring in all that is due to the plaintiff (*a*).

(*a*) Though the defendant ſhews to the Court a diſcharge from the plaintiff of part of the debt, yet if it appear to be given after purchaſing the writ, or that the plaintiff's whole demand is not ſatisfied, or even that any part of the coſts are unpaid, the Court will permit the plaintiff to proceed. Far *v.* Burnley, Mich. 2. *Geo.* 2. C. B.—NOTE *to the former edition.*

*[237]

Caſe 161.

* Martin *againſt* Henriques.

Judgment ſet aſide, becauſe ſigned within four days, &c.

UPON a *ſcire facias* on a judgment againſt the principal, he pleaded "*nul tiel record.*"

The plaintiff thereupon produced the record, and THE MASTER ſigned the roll *quòd querens protulit recordum*, and the plaintiff ſigned judgment the very next day, and took out execution.

But upon a motion this execution was ſet aſide as *irregular*, becauſe he ought not to have ſigned the judgment until *four days* after the record was brought in.

Caſe 162.

Chriſty *againſt* The Manucaptors of Anſtruther.

Thurſday, 23 *April*, 1724.

Quære, Whether ſpecial bail ſhall be given in an action of debt on a recognizance of bail given purſuant to 3. *Jac.* 1. c. 8.

Dougl. 449.

UPON A WRIT OF ERROR brought in THE EXCHEQUER-CHAMBER on a judgment given in the king's bench, the now defendants entered into a *recognizance* purſuant to the ſtatute 3. *Jac.* 1. c. 8. "that the plaintiff in error ſhould proſecute his "writ with effect; and if the judgment ſhould be affirmed, then "to pay the debt, damages, and coſts." Afterwards the judgment was affirmed, and then the plaintiff brought an action of debt upon this *recognizance* againſt the bail.

The queſtion was, Whether they ſhould be diſcharged upon common bail?

IT WAS SAID *by their Counſel*, that they ought to be diſcharged, for it is againſt the practice of the Court, that bail ſhould be required of bail.

ON THE OTHER SIDE *it was ſaid*, that it was never yet determined, that ſpecial bail is not requirable in an action of debt on a recognizance of bail; but the reaſon of the caſe ſeems to require it, becauſe the recognizance is directly for payment of money, *viz.* "to "pay the debt if the judgment ſhould be affirmed;" and certainly it was never yet denied, that where an action of debt is brought on a bond for payment of money, but that ſpecial bail is always required; and the reaſon is the ſame for ſpecial bail in an action of debt upon a recognizance againſt the bail, for ſuch recognizance is a ſecurity for the payment of the condemnation-money, and a collateral

collateral undertaking, that it ſhall be paid upon the affirmance of the judgment; and the bail upon the recognizance cannot be diſcharged but upon payment of the money, for they cannot render the principal, becauſe ſuch render does not lie by the * bail upon a writ of error.

CHRISTY *againſt* THE MANUCAPTORS OF ANSTRUTHER.

THE COURT doubted; it depending on practice, and practicers not agreeing. * [238]

FORTESCUE and RAYMOND, *Juſtices*, ſeemed of opinion, that ſpecial bail might be required; and thought that in debt upon a judgment ſpecial bail was always given.

PRATT, *Chief Juſtice*, rather inclined to think ſo.

Adjournatur.

Shipton *againſt* Hopton.

Caſe 163.

THIS was an action of DEBT, *qui tam, &c. (a)* brought by a *common informer*, on the ſtatute 5. *Ann.* c. 14. for fifteen pounds, wherein the plaintiff declared on two ſeveral counts, one for ten pounds for killing two partridges, the other for five pounds for keeping an engine to deſtroy the game, not being qualified, &c. *virtute ſtatutorum hujus regni*; upon *nil debet* pleaded, the plaintiff had a verdict for five pounds only.

Debt for keeping an engine to deſtroy the game.

It was now moved, that he might enter the verdict on either of the counts, becauſe the defendant intended to move in arreſt of judgment; for though he might not be qualified by the ſtatutes of this land to keep a gun, yet if he be otherwiſe qualified by law, he is not ſubject to this penalty. Now he may be qualified by law, as being huntſman to a nobleman, who, in coming up to the parliament, may kill a deer in any of the king's foreſts; and this he may do by the Foreſt-law, which is part of the law of this realm.

And for this reaſon the plaintiff was ordered to enter his judgment.

(*a*) This action is given by the ſtatute 8. *Geo.* 1. c. 19. by which it is enacted, "that where an offence ſhall be committed againſt any law for preſerving "the game, and the offender liable to "pay a pecuniary penalty, upon a conviction before a juſtice, any perſon "may ſue for it by an action of debt." See now 25. *Geo.* 2. c. 2. 2. *Geo.* 3. c. 19.

Burges *againſt* Bracher.

Caſe 164.

BY ARTICLES made between the plaintiff and the defendant for a horſe-match, it was agreed, that the plaintiff ſhould ride "without whip or ſtick, or other weapons, except boots and "ſpurs."

If an *agreement* be that *A.* ſhall ride a horſe-match "*without* "*whip* OR *ſtick*, "OR *other weapons*," and in an action on this agreement the declaration ſtate, that *A.* rode the match "*without whip* AND *ſtick* OR *other weapons*," the variance is cured by the verdict.—S. C. 2. Ld. Ray. 1366. S. C. 1. Stra. 594.

An

BURGES *againſt* BRACHER.

An action of covenant was brought on theſe articles, and the declaration ſet forth, that the plaintiff mounted the horſe *ſine flagello et baculo vel aliis armis*, and did ride *in formâ prædictâ*.

Upon the general iſſue pleaded, the plaintiff had a verdict.

IT WAS MOVED *in arreſt of judgment*, that this declaration was not purſuant to the article of agreement, for that was to ride
*[239] " without whip or ſtick, or * other weapons," in the diſjunctive; and the declaration is *ſine flagello et baculo* in the conjunctive.

This caſe was compared to ſome caſes which were adjudged upon wagers in the late wars, *viz.* " that *the Engliſh* would beat " *the French* without the help of *the Germans* OR *the Dutch*;" and in an action brought for the money won, the plaintiff laid in his declaration, that *the Engliſh* did beat *the French* without the help of *the Germans* AND *the Dutch*; and this was held ill.

IT WAS OBJECTED *on the other ſide*, that there is a caſe in *Cro. Eliz.* (*a*) where the defendant was by agreement to pay ſo much money when ſuch a ſhip arrived in ſuch a port; and the declaration was, that the ſhip arrived *ad portum*, inſtead of *in portu*; and this was moved in arreſt of judgment, but not allowed: which is very true, becauſe the prepoſition *ad* ſignifies *at* or *in*. Deeds, it was ſaid, ought to be favourably conſtrued; becauſe they are made by the conſent of the parties; but it does not follow from thence, that declarations ought to have a favourable conſtruction; for the reaſon is not the ſame, becauſe they charge the defendant in an adverſary manner, and are preſumed to be drawn by perſons of ſkill; beſides, deeds are taken moſt ſtrongly againſt the grantor (*b*). Beſides, the riding " without whip and ſtick" alters the whole ſenſe of the articles, for he may ride without both, but ſtill he may ride with one of them; therefore the plaintiff ſhould have laid in his declaration, that he rid without either.

REEVE *contra*. The averment is a good averment, and would be ſo on a demurrer; for the conſtruction muſt be *ſine flagello et ſine baculo*, for *ſine* is underſtood, and governs both the caſes: and though the agreement varies in expreſſion from the averment, yet both in ſubſtance are the ſame.

SECONDLY, The latter end of the ſentence being diſjunctive, " *vel aliis armis*," muſt refer to every precedent allegation, and ſo make the whole diſjunctive (*c*).

THIRDLY, If the averment was inſufficient, yet it is cured by the verdict; for otherwiſe the plaintiff could never have a verdict; therefore it muſt be intended, that this was proved at the trial (*d*): and there are ſeveral caſes to warrant ſuch intendments. To inſtance in one; *indebitatus aſſumpſit* (*e*) was brought for money received

(*a*) Cro. Eliz. 229. pl.
(*b*) Cro. Eliz. 348.
(*c*) 2. Bulſt 293.
(*d*) Moor, 239. Cro. Eliz. 229.
(*e*) Poulter v. Cornwall, Salk. 9.

upon

upon account; after a verdict for the plaintiff, it was moved in arreſt of judgment, that this action would not lie, but an action of account; for if a man receive money to account, it is not to be demanded as a duty from him until he has neglected or refuſed to account; and this muſt be ſet forth in the declaration; but it was adjudged, that the declaration was helped by the verdict, and that it ſhall be intended he refuſed to account, or had done ſomething to make him an abſolute debtor. BURGES *againſt* BRACHER.

* THE COURT. If the terms of the agreement had not been proved at the trial, the plaintiff could not have a verdict; ſo it muſt be intended that the agreement was ſufficiently proved; and there are ſeveral caſes wherein it has been adjudged, that where words may be taken in a double ſenſe, the Court, after a verdict, will always conſtrue them in that ſenſe which may ſupport the verdict: now here the jury found, that the plaintiff did ride "*ſine* "*flagello et baculo vel aliis armis*," in which the disjunctive "*vel*" in the latter part of the ſentence, qualifies the conjunctive "*et*," and disjoins that copulative; ſo that it ſhall be taken in a disjunctive ſenſe. * [240]

So judgment was given for the plaintiff.

The Eaſt-India Company *againſt* Ellis. Caſe 165.

AFTER a judgment by default for the plaintiff, and a writ of inquiry brought, it was moved, that it might be executed before THE CHIEF JUSTICE, at the ſittings at *Guildhall* in *London*, the action being brought for twenty thouſand pounds: and a rule was made accordingly. Writ of inquiry executed before the Chief Juſtice.

Hutchinſon *againſt* Smith. Caſe 166.

ONE *T. S.* was arreſted at the ſuit of the plaintiff *Hutchinſon*, and *Smith*, the defendant, became bail to the ſheriff for the appearance of the ſaid *T. S.* at the return of the writ; but before any farther proceedings, *Hutchinſon* died; yet his attorney took an aſſignment of the bail-bond, and proceeded to judgment and execution againſt the bail. The plaintiff died before the return.

And now the Court was moved to ſet aſide theſe proceedings as irregular.

And the matter being ſo reported by THE MASTER, they were ſet aſide.

The King *againſt* Dunbarr. Caſe 167.

UPON THE MASTER'S report, the caſe appeared to be as follows: Attachment againſt perſons reſcuing priſoner who was taken upon an eſcape-warrant.

The defendant *Dunbarr* was a priſoner in the *King's Bench*, and charged in execution there at the ſuit of one *Pilkington*, and afterwards was turned over to *the Fleet*, and there likewiſe charged in

THE KING *againſt* DUNBARR.

in execution at the ſuit of the * ſame party; and on the thirtieth day of *January* laſt was taken in *Leiceſter Fields* upon an eſcape-warrant, ſigned by one of the Judges in the court of king's bench, and then he inſiſted on a day-rule, but upon ſearch there was none for that day; thereupon, as he was carried through THE OLD BAILEY towards *Newgate*, the officers of *the Fleet* reſcued him.

And now upon a motion for *an attachment* againſt them, and that *Dunbarr* might be taken out of *the Fleet* and ſent to *Newgate*; it was inſiſted for him, that he being charged in execution in *the Fleet*, could not be taken by an eſcape-warrant iſſuing out of the court of king's bench.

Beſides, he thought he had a good day-rule, for his name was entered in the petition for day-rules on the thirtieth day of *January*, but the clerk did not come in time to have it read in court that day.

THE COURT. As to the objection, that this man being charged in execution in *the Fleet* (which is the priſon of the court of common pleas) cannot be taken by an eſcape-warrant ſigned by any of the Judges of the court of king's bench; it appears to be otherwiſe upon reading the ſtatute *(a)*, by which it is enacted, "that if any perſon charged in cuſtody in *the King's Bench* or "*Fleet*, in execution, or on meſne proceſs, &c. ſhall go at large, "upon oath made thereof in writing before the Judge of the court "where the commitment, action, judgment or execution was, ſuch "Judge ſhall commit the perſon eſcaped to the common gaol of "the county where retaken, there to remain without bail till diſ-"charged by law."

So that any Judge of the court where the action was brought may grant an eſcape-warrant; and a Judge of the common pleas may grant it, though the priſoner is turned over and charged in execution in *the King's Bench*, and ſo *vice verſâ*.

As to the entry of his name in the petition for a day-rule it ſignifies little unleſs it is read in court.

Therefore an attachment was granted againſt thoſe who reſcued *Dunbarr*, and a rule was made that he ſhould be taken out of *the Fleet* and ſent to *Newgate*.

(*a*) 1. *Ann.* cap. 6.

*[242]

Caſe 168.

* Cloud *againſt* Nicholſon.

An action lies againſt *one* of *two* joint obligors; but the *joint contract* may be pleaded in *abatement*.

1. Saund. 291. Cro. Eliz. 356. 544. 1. Vent. 34. 136. Lut. 696. Stra. 503. 1. Com. Dig. "Abatement" (F. 8.). And ſee Rice *v.* Shute, 5. Burr. 2611. Rex *v.* Abbot, Cowp. 832.

TWO PERSONS were jointly bound in a bond; and in an action brought againſt one alone, the plaintiff had a verdict.

IT WAS NOW MOVED *in arreſt of judgment*, that though this might have been pleaded *in abatement* of the action, yet ſince it appears upon the face of the record in which the bond was entered, that the plaintiff had no right againſt one alone, he cannot have judgment.

THE

THE COURT were of opinion, that it did not appear on the record, that the other *ſigned*, *ſealed*, or *delivered* this bond; but admitting it did appear that he *ſigned* and *ſealed* it, yet if it do not appear that he *delivered* it, it is the bond of the defendant alone, though another is named therein with him, for it is not his deed without the delivery.

CLOVE *againſt* NICHOLSON.

Boſtock *againſt* Boſtock.

Caſe 169.

THE CASE, upon the maſter's report, was as follows: A bond was dated in the year 1706, conditioned for payment of a certain ſum of money, and in the year 1709, one hundred pounds, part of the money, was paid; and by indorſement, reciting that there was thirty-one pounds intereſt then due, it is expreſſed to be paid in diſcharge of the principal.

Money paid in diſcharge of intereſt.

The queſtion was, Whether the thirty-one pounds intereſt then due, ſhall be taken to be part of the hundred pounds then paid? If it is, then ſo much intereſt is diſcharged, and by conſequence ſo much continues part of the principal ſtill, for which intereſt muſt be paid; whereas if the thirty-one pounds intereſt was not diſcharged, no intereſt would be due for it, becauſe it is originally intereſt.

THE COURT ſeemed to incline, that the hundred pounds then paid ſhould be in diſcharge of the intereſt then due, and for the reſidue in diſcharge of ſo much of the principal.

* Hawker *againſt* Hinton.

Caſe 170.

UPON A WRIT OF ERROR of a judgment in the common pleas, the error aſſigned was, *a variance* between *the original* and *the declaration*; the one being "*Jemimman*," the other "*Jememman Force.*"

Continuances may be entered at any time.

ON THE OTHER SIDE *it was ſaid*, that the record was right; and upon producing it, ſo it was, but it was of another number-roll.

Then IT WAS OBJECTED, that the original was "*anno* 7 "*Georgii*," and the declaration was "*anno* 9 *Georgii*," and no continuances entered between the one and the other.

TO WHICH *it was anſwered*, that the continuances might be entered at any time, and that when entered the plaintiff is intitled to his judgment.

THE COURT was of opinion, that the attorney ought to be puniſhed for making up a ſecond record, but that the plaintiff muſt have his judgment.

Crowther

Caſe 171. Crowther *againſt* Wheat.

A writ altered after it is ſealed, this is a great miſdemeanor.

SCIRE FACIAS was brought againſt the bail, and their attorney demanded *oyer* of the writ, and ſaw many raſures and interlineations in it, and for that reaſon he did not make any defence:

But now moved the Court, that all the proceedings thereon might be quaſhed.

See 6. Mod. 310.

THE COURT was of opinion, that this was no ground to quaſh the proceedings; for if any alteration was made in a thing immaterial after the ſealing the writ, there is no harm done; and if in any thing material before the writ was ſealed, yet that will not vitiate it; ſo the Court would not quaſh it, or any proceedings thereon, but ſaid, if the motion had been made againſt the clerk who raſed it, and it appeared to be done after the writ was ſealed, it is a miſdemeanor, and puniſhable.

EASTER TERM,

The Tenth of George the Firſt,

IN

The Court of Exchequer.

Sir Robert Eyre, *Knt. Chief Baron.*

Sir Francis Page, *Knt.*
Sir Jeffery Gilbert, *Knt.* } *Barons.*

Sir Philip Yorke, *Knt. Attorney General.*
Sir Clement Wearg, *Knt. Solicitor General.*

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* Anonymous.

Caſe 172.

An adminiſtration *de bonis non* granted in the dioceſe of *Litchfield*, will not ſupport an action for an eſcape on a judgment entered up in *Middleſex*.

5. Co. 30.
Moor, 145.
1. Salk. 40.
6 Mod. 134.
1. Com. D.g. "Adminiſtration" (B. 5.).

IN AN ACTION OF DEBT againſt the ſheriff the caſe was thus:

A. by his laſt will and teſtament made *B.* his executor, and died. The executor proved the will before the commiſſary of the biſhop of *Litchfield*, and as executor of *A.* brought an action againſt *C.* and obtained a verdict and judgment, and thereupon *C.* was taken in execution upon a *capias ad ſatisfaciendum*, and committed, and afterwards eſcaped. Then *B.* the executor died inteſtate, and *D.* took out adminiſtration with the will annexed, *de bonis non* of *A.* in the dioceſe of *Litchfield*, and brought this action of debt againſt the ſheriff for this eſcape.

The defendant demurred, for that the judgment being the foundation of this action, and that being entered in *Middleſex*, the plaintiff could have no right to it by virtue of an adminiſtration taken in the dioceſe of *Litchfield*, which, as to this demand, was void, for he ought to have a prerogative adminiſtration.

But THE COUNSEL *for the plaintiff* inſiſted, that this action would lie for two reaſons:

FIRST,

ANONYMOUS. FIRST, Becauſe the eſcape, which was in the dioceſe of *Litchfield*, was the principal and immediate cauſe of the action, and the judgment ſet forth in the declaration was only an inducement to it.

SECONDLY, That it was not in the power of the executor to alter the condition of his teſtator, ſo as to put the adminiſtrator to take out a prerogative adminiſtration; for he took it *cum teſtamento annexato*; ſo he ſhould have it in the ſame condition it was in at the death of the teſtator; and ONE OF THE BARONS was of that opinion.

But THREE OF THE BARONS, of which EYRE, *Chief Baron*, was one, were of opinion, that the plaintiff could not maintain this action without taking out a prerogative adminiſtration, or an adminiſtration where the judgment was entered, and that was in the dioceſe of *London*; that it was abſolutely neceſſary he muſt take out adminiſtration ſomewhere, and that there could be no inconveniency in taking out adminiſtration above, according to the caſe of *Byron v. Byron* (*a*), where it was held, that a man dying in one dioceſe, and having a bond in another dioceſe, in ſuch caſe there muſt be a prerogative adminiſtration, becauſe the debt
* [245] doth not follow the perſon, * but it is a debt where the bond is at the time of the deceaſe of the inteſtate. So in the caſe of *Adams v. Savage* (*b*) it was held, that adminiſtration granted by the archdeacon of *Dorſet* could be no title to a judgment in any of the courts at *Weſtminſter*. It is true, a will of a perſonal eſtate which lies in a foreign country, and none in *England*, may be proved in that country where the eſtate is (*c*), and need not be proved here.

(*a*) Cro. Eliz. (472). pl. 25.
(*b*) 6 Mod. 136. S. C. 1. Salk. 40. 2. Ld. Ray. 854. 1253.
(*c*) Jauncey v. Sealey, 1. Vern. 397.

EASTER

EASTER TERM,

The Tenth of George the First,

IN

The King's Bench.

Sir John Pratt, *Knt. Chief Juſtice.*
Sir Lyttleton Powys, *Knt.*
Sir John Forteſcue Aland, *Knt.* } *Juſtices.*
Sir Robert Raymond, *Knt.*
Sir Philip Yorke, *Knt. Attorney General.*
Sir Clement Wearg, *Knt. Solicitor General.*

The King *againſt* Burridge. Caſe 178.

Wedneſday, 10 *June* 1724.

If parties in a cauſe enter into a rule of court, that THE MASTER ſhall name forty-eight ſpecial jurors, and that each party ſhall ſtrike out twelve, and the ſheriff return the remaining twenty-four to try the iſſue, and the defendant ſtrike out hundredors, and challenge THE ARRAY for want of hundredors, it is a *contempt of court*, puniſhable by *attachment*, although the Judge at the trial allow the challenge. —S. C. 2. Ld. Ray. 1364. S. C. 1. Stra. 593. Ante, 186. Andr. 52. 2. Stra. 1000.

A RULE OF COURT was made by conſent, that the ſheriff of the county of *Devon* ſhould bring the freeholders book before the maſter of the office, and that he ſhould return *forty-eight* men, and that each of the parties ſhould be at liberty to ſtrike out *twelve*, and that the maſter ſhall appoint the *twenty-four* remaining to be returned by the ſheriff to try the iſſue joined between the parties.

This rule was made by conſent.

Afterwards, when the parties attended the maſter, the defendant ſtruck out ſome *hundredors*, and at the trial he challenged THE ARRAY for want of *hundredors*; and the judge of aſſize allowed the challenge, and directed, that the plaintiff in the action might take what remedy he could by law.

It was now moved for an attachment againſt the defendant, for that this challenge to THE ARRAY was a breach of the rule of court, and a contempt thereof.

THE KING *againſt* BURRIDGE.

IT WAS ARGUED *for him*, that his entering into this rule did not take from him the liberty of challenging the jury; if it did, it muſt be by implication, which could never be a good foundation for an attachment; for the cauſe to iſſue out an attachment ſhould be as certain as the cauſe to warrant a judgment, and there was never yet an attachment granted in ſuch a caſe. There are rules where there was an expreſs injunction not to challenge; as in *Dunſter's Caſe*, in the tenth year of *Queen Elizabeth*, in which rule it was ordered, *quòd nulla ſit calumnia de utrâque parte panello*; and there are other rules where it was inſiſted on, but denied, as in the caſe of *The King v. Kiffin* (*a*), where a rule was made, as in this caſe, for ſtriking a ſpecial jury, and JONES, *Attorney-General*, moved, that it might be inſerted in the rule, that neither of the parties ſhould be at liberty to challenge THE ARRAY, but it was denied PER TOTAM CURIAM, for it could not be granted but by
* [246] conſent; and it was not at that time pretended, that * this was implied in the rule, for if it had, he need not have moved the Court that it might be expreſſed. In the caſe of *The King v. Sherard*, in the firſt year of *George the Firſt* (*b*), theſe words were added to the like rule, by conſent of both parties, *quòd nullum advantagium capiatur pro defectu hundredor* (*c*). But admitting this was implied by the rule, yet the defendant cannot be ſaid to be guilty of a contempt for challenging THE ARRAY, for it is no more than an inadvertency, or a miſtake of the ſenſe and meaning of the rule. Now the different ways of drawing up theſe rules ſhew, that there muſt be an expreſs conſent of the parties not to challenge, otherwiſe no attachment will lie for challenging, neither will ſuch conſent take away any legal objection the party has to challenge; and if ſuch a rule, as in the principal caſe, would ſerve, what reaſon can be given why an expreſs conſent ſhould be put in ſo many rules for ſtriking ſpecial juries?

Judgment given by a Judge of aſſize after he came to town.

BESIDES, this matter hath received judgment already, for the rule was produced at the aſſizes, and pleaded in bar to this challenge, and the defendant demurred to it, and the plaintiff joined in demurrer; and when the Judge came to town, he gave judgment for the defendant.

At which THE CHIEF JUSTICE ſeemed to be ſurprized, that a Judge ſhould give judgment after he came to town.

But THE COUNSEL *for the defendant* ſaid he might, when it was by the conſent of the parties; as where a verdict is found, and the Judge takes time to conſider what judgment to pronounce, or what fine to ſet. And for theſe reaſons it was inſiſted, that no attachment ſhould go.

IT WAS INSISTED *for the attachment*, that this challenge was a contempt to the Court, and a breach of their rule, for that was, that THE MASTER ſhould appoint twenty-four to be returned by

(*a*) Eaſter Term, 29. *Car.* 2. 3. Keb. 740.

(*b*)

(*c*) 2. Roll. Rep. 365.

the

the ſheriff to try the iſſue; now this challenge to THE ARRAY deſtroyed this rule, for it was a *ſuperſedeas* of the whole return; like a rule of court or bond to ſtand to an award; yet if the party retract the ſubmiſſion, it is a breach of ſuch rule, and a forfeiture of the bond, both which are implied in the ſubmiſſion, for *qui adimit medium deſtruit finem.* The defendant might have taken a challenge to THE POLLS, but he knew that would be ſupplied by *taleſmen*; therefore to make all ſure, and to prevent the trial, he took a challenge to THE ARRAY for want of hundredors, and this with an air * of inſolence, after he had been ſummoned to appear before THE CHIEF JUSTICE of this court, and had his opinion, that he (the defendant) could not ſtrike out all the hundredors. For which reaſons it was inſiſted, that the attachment might iſſue.

THE KING *againſt* BURRIDGE.

* [247]

THE COURT was of opinion, that the defendant was guilty of a premeditated contempt, becauſe his challenge, drawn up in form, and arraigned at the aſſizes, ſhews his deſign was to put off the trial.

As to the rule made in this caſe, it may be without the conſent of the parties, as well where the trial is by *niſi prius* as at bar, and that likewiſe in criminal caſes as well as civil, and without any infringement of the liberty of the ſubject, but rather for the ſake of juſtice, and to preſerve their liberties; and if ſuch challenges are good, theſe rules would be avoided and made uſeleſs, which is a contempt of this Court; and the caſe cited of *The King v. Kiffin*, to ſhew that the party may challenge, if it be not expreſsly prohibited in the rule, is (*a*) wrong; for though it be not expreſſed, yet if it be neceſſarily implied, the power of challenging is taken away; for otherwiſe theſe rules would be to little purpoſe. Now this rule is, that the iſſue ſhall be tried *per reſiduum juratorum*, but challenging THE ARRAY is as much as to ſay, it ſhall not be tried by that jury, and that the ſheriff ought not to return them, when he was bound by the rule to return thoſe, and no other. Now, as the Court has a power to inforce obedience to their own rules, it is but reaſonable they ſhould puniſh thoſe who break them.

So the rule was made abſolute for an attachment.

AFTERWARDS the defendant *Burridge* gave bail on *the attachment*, and *Mr. Crews*, who was his attorney and under-ſheriff, was one of the bail.

The proſecutor then moved, that the high-ſheriff might return the jury to try this cauſe, becauſe the under-ſheriff, who has *retorna brevium*, was attorney in the cauſe and bail on the attachment.

(*a*) They did not ſay that that caſe was wrong reſolved, but that it did not prove what it was cited for; they agreed, that if it was not expreſſed it was implied. PRATT, *Chief Juſtice*, ſaid, that but two precedents had been quoted which had ſuch clauſes; he ſaid, that upon ſearch they found the rules of *B. R.* to have been ſo.—NOTE *to former edition.*

THE KING *againſt* BURRIDGE.

And a motion being made for a ſpecial jury, and a queſtion being put, Whether that could be granted without the conſent of the parties? THE MASTER of the office was ordered to ſearch for precedents; and he reported, that above thirty years ago there were ſeveral precedents for ſpecial juries upon trials for *niſi prius*, * [248] without the conſent of * the parties; but that in the laſt thirty years there were ſeveral motions made for that purpoſe, but always denied.

THE CHIEF JUSTICE anſwered, that if the Court could once grant motions for ſpecial juries, without the conſent of the parties, to try cauſes at the aſſizes, as it appears by the precedents they might; it was diſcretionary in the Court, whether to grant ſuch motions, or not; for though it was often denied, it cannot be inferred from thence but that the Court may ſtill do it, where it ſeems reaſonable for them ſo to do.

But THE OTHER THREE JUDGES were of another opinion, becauſe the ſheriff is the proper officer to return juries; and if there is no legal exception againſt him, the Court cannot ſlip him, and order another to ſtrike a ſpecial jury, without the conſent of the parties, to try an iſſue at the aſſizes; but if there is any lawful objection againſt him, and it appear to be ſo upon affidavit made, then a ſpecial jury may be ſtruck by the maſter of the office, without the conſent of the parties: now, all that was ſhewn in this caſe why there ſhould be a ſpecial jury was, that the defendant made affidavit that he feared he could not have a fair trial without ſuch a jury (*a*).

Then it was offered as a reaſon why there ſhould be a ſpecial jury to try this cauſe at the next aſſizes, becauſe ſuch a jury was thought requiſite to try it at the laſt aſſizes.

But THREE OF THE JUDGES were of opinion, that a ſpecial jury might be granted to try a cauſe at BAR without the conſent of the parties, but never at the *niſi prius*, unleſs very good cauſe was ſhewed, and that the cauſe now ſhewed was not ſufficient; therefore ſince the high-ſheriff is the proper officer to return juries, and there is no imputation againſt him (as there was not in this caſe), the Court would not vary from him without the conſent of the parties.

So he was ordered to return this jury.

And in the ſame Term, there was another motion for a ſpecial jury in the caſe of *Goodright v. Miſt*; and the like rule was made.

(*a*). But now by 3. *Geo.* 2. c. 25. either party is intitled, upon motion, to have a ſpecial jury ſtruck upon the trial of any iſſue, as well at the aſſizes as at bar, and as well in indictments and informations for *miſdemeanors* as in civil actions. But the party applying for ſuch ſpecial jury muſt pay the extraordinary expence, unleſs the Judge, in purſuance of 24. *Geo.* 2. c. 18. certifies that ſuch ſpecial jury was neceſſary.

EASTER TERM,

The Tenth of George the Firſt,

AT

The Old Bailey,

BEFORE

Sir Jeffery Gilbert, *Knt. Chief Baron*

OF

THE COURT OF EXCHEQUER.

Anonymous. Caſe 179.

AT A SESSIONS of *oyer* and *terminer* held at THE OLD BAILEY in *April* laſt this caſe happened:

Indictment for ſtealing the goods of an unknown perſon.

A looſe and idle perſon was apprehended at *Southampton*, and being brought before a juſtice of peace, a ſilver tankard was found in his poſſeſſion, and he giving no ſatisfactory account how he came by it, and the juſtice ſuſpecting he ſtole it, committed him to priſon.

* [249]

Being brought by *habeas corpus* to NEWGATE, he was indicted for ſtealing a ſilver tankard, value ten pounds, of the goods and chattels of *a perſon unknown.*

At the trial the proſecutor offered to give evidence, that this was a looſe and diſorderly perſon, and therefore it muſt be preſumed that he could have no property in the tankard, but that he ſtole it,

But GILBERT, *Chief Baron*, who was then in court, ſaid, that though an indictment might be good for ſtealing the goods *cujuſdam ignoti*, yet a property muſt be proved in ſomebody at the trial, otherwiſe it ſhall be preſumed that the property was in the priſoner, by his pleading "*not guilty*" to the indictment; for a man ſhall not be found guilty of felony, and hanged upon preſumption.

LORD CHIEF JUSTICE HALE ſaid, that he would never convict any perſon for ſtealing the goods *cujuſdam ignoti*, merely becauſe he would not give an account how he came by them, unleſs there were due proof made, that a felony was committed of theſe goods. 2. Hale's Hiſt. Pl. Cr. 290.

EASTER TERM,

The Tenth of George the First,

IN

The King's Bench,

Sir John Pratt, *Knt. Chief Juſtice.*
Sir Lyttleton Powys, *Knt.*
Sir John Forteſcue Aland, *Knt.* } *Juſtices.*
Sir Robert Raymond, *Knt.*
Sir Philip Yorke, *Knt. Attorney General.*
Sir Clement Wearg, *Knt. Solicitor General.*

Sir Walter Baggott *againſt* Oughton.

Caſe 180.

UPON A CASE ſtated, and referred out of the court of chancery for the judgment of this Court, it was thus:

Sir Edward Baggott, the father of the plaintiff, upon his marriage with his wife, the plaintiff's mother, in conſideration of that marriage, and of a conſiderable ſum of money which he was to have with her as a marriage-portion, which could not be raiſed otherwiſe than by ſelling her father's eſtate, ſhe being the only child of the family, and *Sir Edward*, for that reaſon, being unwilling that the eſtate ſhould be ſold, agreed by indenture made between them, that A FINE ſhould be levied of the lands, and the uſes thereof declared to *Sir Edward* for life, then to the uſe of his wife for life, remainder to the plaintiff in tail, &c. reverſion in fee to *Lady Baggott*; in which ſettlement there was A PROVISO, that *Lady Baggott* ſhould have power to charge the whole eſtate with the payment of five hundred pounds to any perſon to whom ſhe ſhould give the ſame; and with a farther power, that any perſon who ſhould be actually ſeiſed of the lands by virtue of this ſettlement, might make "a leaſe or leaſes for three lives, or for twenty-"one years, of all or any part of the premiſes in the indenture or "fine comprized at ſuch yearly rents, or more, as the ſame were

Under a power in a family ſettlement, to make leaſes of the premiſes, reſerving the ancient rents, lands always occupied with the family-ſeat cannot be demiſed.
S. C. poſt. 381.
S. C. Fort 332.
S. C. 1. Peer. Wms. 347.
1. Vezey, 51.
2. Peer. Wms. 659.
2. Bro. Caſes Ch. 104, 153.
3. Bro. Chan. Caſ. 21, 348.
4. Bro. Chan. Caſ. 45.

SIR WALTER BAGGOTT *against* OUGHTON.

"then let at." * *Sir Edward Baggott* died, and *Lady Baggott*, being the next in remainder for life, entered, and afterwards married *Sir Adolphus Oughton* (the now defendant), and then made a leaſe to him of the *capital meſſuage* for twenty-one years, but reſerved no rent; and about a month afterwards ſhe died.

The ſingle queſtion now before the Court for their opinion was, Whether this was a good leaſe?

IT WAS ARGUED *for the plaintiff*, that it was not, becauſe this capital meſſuage being never yet let, by conſequence there was no rent reſerved at the time of making this ſettlement, therefore this power can never be purſued; and for this *Lord Mountjoy's Caſe* (*a*) was cited as an authority in point, which was thus: A tenant in tail, with a power to make leaſes, &c. reſerving the ancient rent, made a leaſe of two diſtinct farms, reſerving the ancient rents out of both the farms in one entire ſum; this was adjudged a new rent, and not the old accuſtomed rent; and that if he reſerve a leſs ſum than the accuſtomed rent, the leaſe is void. So in *Fitzwilliams's Caſe* (*b*) it was reſolved, that a power by which the intereſt of a ſtranger ſhall be charged muſt be taken ſtrictly, as a power to make leaſes for twenty-one years; and he who has ſuch a power cannot make a leaſe for twenty-one years to commence *in futuro*. The power in the principal caſe reſerved to make leaſes was intended for the benefit of the family, *viz.* to make leaſes of ſuch lands which had been actually, anciently, and uſually let; and though it was indefinitely to "make leaſes of all, or any "part of the premiſes comprized in the indenture of fine," yet theſe words are reſtrained, in the latter part of the ſentence, to ſuch leaſes where the yearly rents or more were reſerved, "as the ſame were let at when the ſettlement was made;" and the authorities in the margin were cited (*c*), to prove, that general words in a deed are to be qualified and reſtrained by particular and ſubſequent words in the ſame clauſe. It is true, this lady had an intereſt coupled with her power, but her intereſt in reſpect to any charge to affect the remainder-man is entirely void; for this leaſe, as to him, muſt ariſe out of her power, and is no more than if made by an attorney. Now, ſuppoſing ſhe had made a leaſe of lands not in poſſeſſion, ſuch leaſe would have been abſolutely void;
*[251] neither ſhall a leaſe, without rent reſerved, * be good to charge the plaintiff, who is the remainder-man. Beſides, *Sir Walter Baggott* (the now plaintiff) is a purchaſor of this eſtate under the ſaid ſettlement, and is heir at law both to *Sir Edward* and the lady, to whom this power was reſerved; and all powers given to tenants for life ſhall be ſtrictly conſtrued, becauſe they make the eſtate to continue as a charge on thoſe in remainder (*d*); therefore the

(*a*) 5 Co. 5.
(*b*) 6. Co 32.
(*c*) Moor, 832. 1. Roll. Rep. 375. 2. Roll. Rep. 278. 3. Rep. 154. Hob. 275. Litt. Rep. 345. 1. Jones, 22. 26. 3. Lev. 274. Shower, 150.
(*d*) 8. Co. 79. 2. Cro. 318. 458. 1. Roll 12. Palm. 104. 3. Mod. 378. Salk 537.

words,

words, "to make leaſes, &c. at ſuch yearly rents, or more, as the "ſame were then let," muſt reſtrain this power to make leaſes only of ſuch lands which were let at that time.

On the other side *it was argued for the defendant*, that this was a good leaſe, and well warranted by the power, which is, for the tenant in poſſeſſion to make leaſes "of all or any part of the "lands comprized in the indenture or fine, &c." Now if the power had reſted there, this leaſe had been certainly good, and nothing could be objected to make it otherwiſe. But it has been ſaid, that the ſubſequent words, "to make leaſes at ſuch yearly rents "as the ſame were let at that time," reſtrains this power to lands which were then let; and this capital meſſuage being never let, this power can never extend to it. But theſe ſubſequent words are only explanatory of the firſt part of the ſentence, "that the "lands uſually let may be leaſed at the uſual rent:" now, by the firſt part of the proviso, the tenant in poſſeſſion had power to make leaſes "of all or any part of the lands comprized in the "ſettlement;" and the ſubſequent part of the clauſe ſhall not control that power without negative words, and there are no ſuch words in this caſe. Beſides, this power is reſerved to *Lady Baggett*, who had the inheritance of theſe lands, and from whom all the eſtates in the ſettlement moved; and it is not a power ſuperadded to the eſtate of a third perſon, and therefore ſhall have a very favourable conſtruction (*a*). As to *Lord Mountjoy's Caſe* (*b*), there are ſome points reſolved which have ſince been denied to be law; and in 2. *Roll. Abr.* 262. there is a contrary reſolution; but the caſe of *Walker v. Wakeman* is full in point (*c*): It was a conveyance of lands and a rectory to the uſe of *T. S.* for life, with a power to make a leaſe of the premiſes, "or of any part thereof, ſo as five ſhil-"lings rent was reſerved for every acre of land;" the tenant for life made a leaſe of the rectory, reſerving a rent; now this not being land, but conſiſting in tithes, the queſtion was, Whether this leaſe was warranted by that power? and it was adjudged that it was becauſe the reſtrictive clauſe was in the affirmative, and ſhall not reſtrain the general words in the preceding part of the ſentence; it is true, *Chief Juſtice* Hale ſaid, that if this had been *res integra* he ſhould have been of another opinion. The conſtruction of powers is various, according to the intent of thoſe by whom they were created, for ſometimes they are conſtrued liberally, and ſometimes very ſtrictly; but the power in the principal caſe being reſerved to her who had the inheritance of the eſtate originally before the ſettlement was made, is part of her old dominion; and where the execution of ſuch a power is agreeable to the intention of the donor, and conſiſtent with his will at the time it was created, it muſt have a very liberal and favourable conſtruction; and this was the concurrent opinion of the court of chancery in the laſt Term, aſſiſted by the master of the rolls, and by Gilbert and Price, *Barons*, in *Lord Coventry's Caſe* (*d*).

* [252]

(*a*) 2. Vent. 350.
(*b*) 2. And. 307.
(*c*) 1. Vent. 294. 2. Lev. 150.
(*d*) 2. Peer. Wms. 222. 1. Stra. 596.

To

SIR WALTER BAGGOTT *againſt* OUGHTON.

TO WHICH *it was anſwered*, that it is not material whether the eſtate moved from *Lady Baggott*, as being her inheritance before this ſettlement was made, becauſe the Court will judge of this power as it appears upon the face of that ſettlement. It is true, there are no negative words ſimply in the ſubſequent part of this clauſe to control the power given in the precedent part; but there are reſtrictive words, which imply a negative, and reſtrain the tenant from overcharging the reverſioner. It is to be obſerved, that *Chief Juſtice* VAUGHAN, in delivering the opinion of the Court in a caſe reported by him (*a*), ſaid, that where power is given to make leaſes of lands for twenty-one years, reſerving the rents which were thereon reſerved at the time of the making the deed, that in ſuch caſe the lands demiſable by that power muſt be lands then in leaſe, on which ſome rent is reſerved.

THE COURT was unanimous of that opinion for the plaintiff in this caſe.

After the death of PRATT, *Chief Juſtice*, this cauſe came on once more, in *Hilary Term*, the twelfth of *George the Firſt*, to be argued.

THE WHOLE COURT was of opinion, that the leaſe of the manſion-houſe and demeſnes was void (*b*).—This opinion was, on argument, affirmed by THE CHANCELLOR, and by him decreed accordingly; and that decree affirmed in THE HOUSE OF LORDS, on appeal (*c*).

(*a*) Vaugh. 35.

(*b*) It appears by the Regiſter's book, that the Judges of the court of king's bench certified their opinion in this caſe, Reg. lib. A. 1716. fo. 438.; but the certificate has been loſt, and no decree can be found. See Dougl. 569.

(*c*) See Pomeroy *v.* Partington, 3 Term Rep. 665; Goodtitle *v.* Funcian, Dougl. 567.

TRINITY

TRINITY TERM,

The Tenth of George the Firſt,

IN

The King's Bench.

1725.

Sir John Pratt, *Knt. Chief Juſtice.*
Sir Lyttleton Powys, *Knt.*
Sir John Forteſcue Aland, *Knt.* } *Juſtices.*
Sir Robert Raymond, *Knt.*
Sir Philip Yorke, *Knt. Attorney General.*
Sir Clement Wearg, *Knt. Solicitor General.*

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* Shaw *againſt* Way. Caſe 181.

IN A SPECIAL VERDICT in ejectment the caſe was thus: *Thomas Ravenſcroft* being ſeiſed in fee of lands, &c. in the pariſh of *Hawarden*, in the county of *Flint*, did, by his laſt will, deviſe the ſame to *Dorothy* his wife for life; and farther, he deviſed to his ſaid wife the ſum of five hundred pounds, "to be "raiſed by her, or by her executors, &c. by ſale of timber-trees, "or by ſale of any part of the lands, or by digging, ſinking, getting, "and ſale of coals on the premiſes, &c. at her choice, or at the "election of her executors; and that if his ſaid wife ſhould die "before the ſaid ſum of five hundred pounds was raiſed, then he "gave her power, either by deed or will, in her life-time, to ap- "point any perſon to raiſe the ſame after her death, in manner as "aforeſaid; but if either of his ſiſters, *Anne Lunsford* or *Dorothy* "*Evatt*, or the truſtees named in his will, ſhall pay unto his ſaid "wife, or to her executors, &c. the ſaid ſum of five hundred "pounds, then the power of ſelling timber, &c. ſhall ceaſe." And after the deceaſe of his ſaid wife, he deviſed the ſaid lands to

Where a man may have a fee-ſimple by deviſe without the word *heirs*; and where the deviſees take an eſtate for life with contingent remainders, &c. S. C. poſt. 382. S. C. 1. Eq. Caſ. Abr. 184. S. C. Fitzg. 7. S. C. 2. Stra. 798. S. C. Forteſ. 58. S. C. 3. Danv. 178. S. C. Bar. K. B. 54. Forteſc. Rep. 158. Barnard. K. B. 54. cited in Andr. 339. 1. Com. Dig. "Deviſe" (N. 6.), (N. 7.).

Francis

SHAW against WAY.

Francis Bramſton, *Serjeant at Law*, *Charles Nott*, and *Edward Parry*, and "to the ſurvivor and ſurvivors of them (*a*), (ſubject to "the raiſing the five hundred pounds) upon truſt for his ſaid "ſiſters, equally between them during their lives, without commit-"ting any waſte; and that if they happen to die leaving iſſue or "iſſues of their bodies, then in truſt, that the mother's ſhare ſhall * [254] "be for ſuch iſſue or iſſues, or elſe in * truſt for the ſurvivor or "ſurvivors of them, and their reſpective iſſue or iſſues; and that if "both his ſaid ſiſters ſhould die without iſſue, or having iſſue "ſuch iſſue ſhall die without iſſue, then the ſaid truſtees ſhall "ſtand and be entruſted for *John Swift*, and the heirs males of his "body; and for want of ſuch iſſue, then in truſt for *Ravenſcroft* "*Gifford*, and the heirs males of his body;" with ſeveral remainders over.

THE JURY find, that *Thomas Ravenſcroft* died ſeiſed of the premiſes without iſſue, and that *Dorothy* his widow ſurvived and entered, and died ſeiſed; that after her death *Anne Lunsford* and *Dorothy Evatt* entered, and were ſeiſed; that *Anne Lunsford* died, never having any iſſue; that *Dorothy Evatt* ſurvived; and that after the death of the ſaid *Anne*, ſhe entered on the whole, and was thereof ſeiſed, and levied a fine at the grand ſeſſions in *Flintſhire*, in the fourth year of *James the Second*, of the premiſes, by the name of "four meſſuages, &c." and declared the uſes thereof to *Thomas Williams* and his heirs, until a common recovery ſhould be had, &c.; and that in the ſame year a common recovery was ſuffered in the ſaid court, and the uſes thereof declared to the ſaid *Dorothy Evatt*, her heirs and aſſigns for ever. They farther find, that the ſaid *Dorothy Evatt* was heir at law to the teſtator, and that *John Swift* was dead without iſſue; that *Ravenſcroft Gifford*, in the year 1693, and in the life-time of the ſaid *Dorothy Evatt* and *John Swift*, went beyond ſea, and there continued twenty-ſix years, until the year 1719; that the ſaid *Francis Bramſton* and *Charles Nott* died in the life-time of *Edward Parry*; that the ſaid *Dorothy Evatt* died in the year 1698, without iſſue, and that ſhe never had any iſſue of her body; that the ſaid *Ravenſcroft Gifford* entered and was ſeiſed; and being ſo ſeiſed, he demiſed the lands to *William Shaw*, the plaintiff, in the fifth year of *George the Firſt*, for ſeven years, by virtue of which demiſe he entered and was poſſeſſed, until he was ejected by the defendant; and ſo they make a general concluſion.

THIS CASE came before the Court by *writ of error* from THE GRAND SESSIONS of *Wales*, where judgment was given for the defendant.

THE COUNSEL *for the plaintiff* made theſe queſtions:

FIRST, What eſtate the truſtees took by this will? What eſtate the two ſiſters had? *i. e.*

(*a*) But did not ſay to their heirs.

SECONDLY,

SHAW against WAY.

* SECONDLY, Whether the two ſiſters took an eſtate for life in common, or an eſtate-tail?

THIRDLY, Whether judgment ought to be given for the plaintiff for a moiety, no croſs-remainders being limited by the will to the ſiſters?

As to THE FIRST POINT *it was argued*, that the truſtees had a fee-ſimple, though the deviſe was not expreſsly to them and their heirs; for if they ſhould have a leſs eſtate, it would not ſupport the truſts which were afterwards limited in this will; ſo that the intent of the teſtator would not be completed, becauſe the ſeveral deviſes afterwards made muſt ariſe out of the eſtate deviſed to them. And though in *feoffments* or *grants* the word "heirs" is neceſſary to raiſe a fee, yet it is otherwiſe in *wills*, for there any words which ſhew that the teſtator intended to paſs a fee will be ſufficient to make it ſo: as for inſtance; a deviſe of lands to *T. S.* for ever; ſo a (*a*) deviſe of lands to his wife for life, remainder to his eldeſt ſon, paying to his brothers and ſiſters forty ſhillings a-piece; here was no eſtate deviſed to the eldeſt ſon, but the word "paying" made it a fee-ſimple.

So a deviſe to his ſon, paying three pounds *per annum* to his brother, was adjudged a fee-ſimple in the ſon, becauſe the charge to his brother might ſurvive and continue after the death of the deviſee; and ſo it is in all caſes where the word "paying" is collateral, (*i. e.*) where it is not ſaid "out of the (*b*) profits of the "land:" ſo a deviſe of all his real eſtate paſſes a fee, becauſe the word "eſtate" being *genus generaliſſimum* comprehends the whole, both real and perſonal; and the words (*c*) "all my eſtate" are a deſcription of the fee: ſo on a deviſe of all his lands of inheritance, if the law will permit, it was adjudged that a (*d*) fee paſſed.

So where the teſtator was ſeiſed in fee, and deviſed four coats to four poor boys of the pariſh of *C.* for ever, and all his lands to his wife *Margaret*, and her aſſigns; it was adjudged, that (*e*) *Margaret* had a fee-ſimple, becauſe ſhe took the lands with a perpetual charge.

So in the principal caſe it plainly appears, that the teſtator intended the truſts appointed in his will ſhould be ſupported; * and if that cannot be done but by an eſtate in fee, the truſtees muſt neceſſarily have ſuch an eſtate; and if they took a fee-ſimple, then the truſts are executed by the ſtatute of Uſes, and then *Ravenſcroft Gifford* (the leſſor of the plaintiff) had an eſtate-tail executed in him. * [256]

(*a*) Willock *v.* Hammond, Cro. Eliz. 204. pl. 39. 3. Rep. 20, 21. a. S. C. Spicer *v.* Spicer, Godb. 280. Cro. Jac. 527. pl. 3. S. C. 2. Roll. Rep. 80. S. C.

(*b*) Walker *v.* Collier, Cro. Eliz. 378. pl. 29. 6. Rep. 16. a. S. C.

(*c*) Counteſs of Bridgwater *v.* Duke of Bolton, Salk. 236. pl. 15. 2. Ld. Raym. 968. Eq. Caſ. Abr. 177. pl. 17. S. C. cited in 2. Wil. Rep. 524. by JEKYLL, *Maſter of the Rolls*, as a reſolution given on great conſideration, in which LORD CHANCELLOR COWPER, when of Counſel, diſcouraged a writ of error in parliament. S. C. cited by Talbot, Chan. Caſ. temp. Talb. 162. Forteſc. Rep. 63.

(*d*) Whitlock *v.* Harding, Moor, 873. Godb. 207. Hob. 2. S. C. Roll. Abr. 835. S. C.

(*e*) Smith *v.* Tindall, 2. Salk. 685.

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THE SECOND and THE CHIEF QUESTION was, What eſtate the ſiſters took by this will? And as to that point it was argued, that they took an eſtate for life only, with contingent remainders in tail to their iſſues, and that it was the intention of the teſtator that they ſhould have no larger an eſtate, becauſe of that reſtriction in his will from committing waſte, and an expreſs power of digging coal; both which would have been implied if he had intended them an eſtate-tail; therefore theſe things are a ſufficient indication of his intent to give them an eſtate for life only.

As to that clauſe, *viz.* "if either of them die leaving iſſue or iſſues "of their bodies, then in truſt, that the mother's ſhare ſhall be for ſuch "iſſue or iſſues, or elſe in truſt for the ſurvivor or ſurvivors of them;" this is a joint eſtate-tail to the iſſue, upon a contingency; for otherwiſe the word "ſurvivors" would be inconſiſtent, becauſe there were but two ſiſters, for there could be no ſurvivors between two.

It is true, if the deviſe had been to them for life, and after their death to their iſſue, that would have been an eſtate-tail: as for inſtance; a deviſe to (*a*) *Barnard* for life, and after his deceaſe to the iſſue of his body; this was adjudged an eſtate-tail.

But the caſe of *Loddington v. Kime* is in point, which was thus: A deviſe to his uncle "for life, without impeachment of "waſte, and if he hath iſſue male, then to ſuch iſſue male and his "heirs for ever, and if he die without iſſue male, then to his nephew "in fee;" this was adjudged an eſtate for life in the uncle; for if the teſtator had intended an eſtate-tail, it had been impertinent to have added theſe words, "without impeachment of waſte;" and the inheritance being veſted in the iſſue male and his heirs, theſe words "his heirs" make it certain what iſſue male was intended; then the ſubſequent clauſe, "if he die without iſſue," muſt be conſtrued to relate to what went before, *viz.* "if he die "without ſuch iſſue then living who might take the inheritance as "before directed by the will," for otherwiſe thoſe words would make an eſtate-tail by implication, to deſtroy an expreſs eſtate
* [257] before limited to the iſſue male and his * heirs; ſo in this caſe the will being, that if both his ſiſters die without iſſue, it muſt be intended iſſue then living, and capable of taking the inheritance.

Beſides, all the deviſes over being expreſsly in tail, ſhew, that the teſtator intended only an eſtate for life to his ſiſters.

As to THE THIRD POINT, Whether judgment ſhould be given for the plaintiff for a moiety, if the Court ſhould be of opinion that the ſiſters had an eſtate-tail; it was argued that it ſhall, becauſe the ſiſters being tenants in common, in ſuch caſe, after the death of either of them without iſſue, the remainder takes place immediately with reſpect to her moiety, and the word "ſurvivors" muſt relate to their iſſue.

ON THE OTHER SIDE the *firſt point* was agreed, that the truſtees took an eſtate in fee for the reaſons before-mentioned; ſo it

(*a*) King *v.* Melling, 2. Lev. 58. 801. 10. Mod. 403. Fitzgib. 15. 21. 1. Vent. 214. 3. Lev. 431. Loddington *v.* Kime, Ld. Raym 203. 209. 2. Stra. Forteſc. Rep. 67. 74.

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was chiefly argued upon THE SECOND POINT, (*viz.*) that the ſiſters took an eſtate-tail, with croſs-remainders to their iſſue, which may be inferred from theſe words, "if either of my ſiſters "happen to die, leaving iſſue or iſſues of their bodies, and if "both die without iſſue, then in truſt for *Ravenſcroft Gifford*, &c."

Now it is certain, that the word "iſſue" is as effectual to create an eſtate of inheritance as the words "heirs of the body;" it is mentioned in ſeveral ſtatutes, and particularly in the ſtatute *de Donis*, &c. and in the ſtatute of (*a*) Wills; ſo as to the veſting and continuing of eſtates, it is the ſame, and as effectual as the words "heirs of the body;" and it is more comprehenſive than a deviſe to one for life, and after his deceaſe to his children, which was (*b*) *Wild's Caſe:* it is true, in that caſe it was held an eſtate for life in the deviſee, becauſe he had a ſon and a daughter then living; but if there had been none then living, this would have been an eſtate-tail; and ſo it muſt be in this caſe, and for the ſame reaſon, *viz.* becauſe the ſiſters never had any iſſue.

So a deviſe to his wife for life, and afterwards to her ſon, and if he die without iſſue, having no ſon, remainder over; adjudged an eſtate-tail in the ſon. Moor, 127. Roll. Abr. 837. See 1. Vent. 230.

So in a late caſe in the exchequer, which was thus: *Sir. Sutton* deviſed his lands "to *Thomas Sutton* for life, remainder to his firſt "ſon in tail, and if *Thomas Sutton* and his wife ſhall die without "iſſue, remainder to charitable uſes;" a bill was exhibited in the exchequer to eſtabliſh this charity, and the defendant pleaded, that *Thomas Sutton* ſuffered a common recovery, and declared the uſes to himſelf * and his heirs, which plea was allowed: it is true, that upon an appeal to the houſe of lords, the defendant was ordered to anſwer, but it was on the foot of being a deviſe to a charity; and though the teſtator might intend it for a charity, yet ſince by operation of law it was an eſtate-tail, that muſt be obſerved. Lev. 290. Sutton *v.* Sammon, Hil. 7. *Geo.* Fortesc. Rep. 66. Fitzgib. 13. 26. * [258]

As to THE THIRD POINT, admitting this is an eſtate-tail in the ſiſters, then they will have croſs-remainders by implication; and for this the caſe of (*c*) *Holmes v. Meynell* is an authority in point: The teſtator deviſed his lands "to his two daughters and "their heirs, equally to be divided between them, and if (*d*) they "die without iſſue, then all his land to his nephew *Francis* in "tail;" the youngeſt daughter died without iſſue: and it was adjudged, that the ſurviving ſiſter ſhall have the whole by implication, for that the daughters had ſeveral eſtates-tail by moieties, and the ſurvivor ſhall have the whole by way of croſs-remainder, and *Francis* ſhall have nothing by implication, but muſt ſtay till both the daughters are dead without iſſue. Therefore if *Dorothy Evatt*, who ſurvived her ſiſter, had the whole eſtate by way of croſs-remainder, ſhe having ſuffered a common recovery, all the remainders over are barred thereby.

(*a*) 32. *Hen.* 8.
(*b*) 6. Rep. 16. Moor, 397.
(*c*) T. Raym. 452. T. Jo. 172.
(*d*) It is not ſaid, if either of them die.

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It was admitted *on the other ſide*, that where there is a deviſe to one for life, and after his death to his iſſue, remainder over, this is an eſtate-tail; and ſo it was adjudged in *Melling's Caſe*, which does not differ from the preſent caſe; for here the deviſe was to his ſiſters for life, and if they die without iſſue, remainder over; ſo that in the one caſe a remainder is limited after a dying without iſſue, and in the other caſe it was limited if they die without iſſue. So in the caſe of *Langley v. Baldwin*, which was referred out of chancery to the Judges of the common pleas for their opinion, which was thus: The teſtator deviſed his lands to *Jonathan Langley* for life, without impeachment of waſte; remainder to *J. S.* his grandchild, for life, without impeachment of waſte, with a power to him to make a jointure of the ſame land to any woman he ſhould marry for her life; and after his death he deviſed the lands to the firſt ſon of *J. S.* the grandchild in tail, and ſo to the ſixth ſon; and then deviſed, that if *J. S.* the grandchild ſhould die without iſſue male, the land ſhould remain to *J. B.*; and the queſtion was, What eſtate *J. B.* took by the will? and it was certified by the court of common pleas that he took an eſtate-tail (*a*); which was decreed accordingly. As to the concomitant clauſes, if the words in a will are ſufficient to raiſe an eſtate-tail, theſe clauſes, (*viz.*) with or without impeachment of waſte, or any power to raiſe money, by cutting and ſelling timber, or otherwiſe, ſhall not control the deviſe.

Andr. 339. 2. Stra. 801. Eq. Caſ. Abr. 185. pl. 29. Forteſc. Rep. 66. Fitzgib. 13.

* [259] * As to the caſe of *Loddington v. Kime*, it comes near to the preſent caſe, but yet it is not an authority in point; for there the deviſe was to one for life; and if he hath iſſue male, then to ſuch iſſue male and his heirs: now there the inheritance being veſted in the iſſue male and his heirs, theſe words "his heirs" are a deſcription of the perſon who is to take; but in the preſent caſe there is no deſcription of the perſon who is to take as iſſue; therefore it muſt be ſuch iſſue who is living at the time of the death of the ſiſters; and if ſo, then it is a proper limitation and not a purchaſe; and the rather, becauſe the deviſe is expreſsly to the ſiſters for life, and to their iſſue only on a contingency; but if it had been to them for life, and that if they die without iſſue, remainder over, that would be an eſtate-tail; and all the caſes cited on the other ſide prove no more. As for the concomitant clauſes in this will, "with or without impeachment of waſte, or a power to raiſe money by ſale of timber, &c." it hath been objected, that they are only directory, and ſhall not control the granting part of the will, which is very true; but where the deviſe is to be collected from the intention of the teſtator, and to be ſupported only by implication, certainly thoſe clauſes are good to explain what the teſtator intended.

(*a*) NOTE, By RAYMOND, *Chief Juſtice*, in the caſe of Shaw v. Weigh, an eſtate-tail was raiſed here by implication, becauſe the expreſs deviſe was not to all the ſons; for if there had been more than ſix, and the ſix dead, muſt the heir at law have it before a ſeventh ſon? Eq. Caſ. Abr. 185. pl. 29. Fitzgib. 26. Forteſc. Rep. 79. 2. Stra. 805.

As

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As to THE THIRD POINT, *viz.* if the ſiſters have an eſtate-tail, then whether croſs-remainders are limited to them by this will; this queſtion entirely depends on theſe words, "the ſurvivor or "ſurvivors of them." The clauſe is, "if his ſiſters die leaving iſſue "of their bodies, then the mother's ſhare ſhall be for ſuch iſſue or "iſſues, or elſe for the ſurvivor or ſurvivors of them:" now it was argued, that the word "ſurvivors" muſt of neceſſity relate to the iſſue; for otherwiſe it would be inconſiſtent, becauſe there being but two ſiſters, it is impoſſible it ſhould relate to them, for there can be no ſurvivors between two; therefore it muſt relate to the iſſue; and if ſo, the ſiſters took no eſtate by croſs-remainders; therefore judgment ought to be for the plaintiff in error for a moiety.

It was held clearly by THE COURT, as to THE FIRST POINT, that the truſtees had a fee-ſimple; for where it appears upon the face of the will, that the teſtator intended to give ſuch an eſtate by neceſſary implication, as by limiting ſuch truſts which could not be ſupported, unleſs the truſtees had a (*a*) fee-ſimple, in ſuch caſe a fee ſhall paſs to them, and that the truſts were executed by the ſtatute of Uſes.

* As to the SECOND POINT, which was the chief point, THE CHIEF JUSTICE was of opinion, that this was not a contingent remainder in tail to the iſſue of the ſiſters, and that a limitation to the iſſue does not differ from a limitation to the heirs of the body. It is true, it has been held, that where an expreſs eſtate for life is deviſed, in ſuch caſe no ſubſequent words ſhall create an eſtate-tail by implication; but this is an old antiquated and exploded opinion, and contrary to the later authorities; and in this caſe the ſubſequent words, "without committing waſte," do not control the deviſe. * [260]

It is true, where an eſtate for life is deviſed to one, with a proviſion immediately for all his ſons ſucceſſively, and if he die without iſſue, remainder over, in ſuch caſe the deviſee has but an eſtate for life, becauſe theſe words, "if he die without iſſue," ſhall be intended a dying without ſuch iſſue as are expreſſed in the will; and upon this diſtinction the caſe of (*b*) *Popham v. Bamfield* was adjudged; for there is a great difference between a deviſe to *T. S.* for life, and if he die without iſſue, remainder over, and a deviſe to *T. S.* (without expreſſing for what eſtate), and if he die without iſſue, remainder over.

As to THE THIRD POINT, they all agreed, that if the ſiſters took an eſtate-tail, then they had croſs-remainders by implication; for the ſubſequent words being, "if both die without iſſue, or, "having iſſue, ſuch iſſue die without iſſue, remainder over," this remainder was not to be executed until both ſiſters died without iſſue. They allowed that croſs-remainders would not riſe to more than two by implication; but in this caſe there were but two ſiſters, ſo ſuch remainders may very well riſe to them.

(*a*) Roll. Abr. 611.

(*b*) Salk. 236. pl. 14. Eq. Caſ. Abr. 368. pl. 2. Forteſc. Rep. 69. Vern. 79. pl. 167. Ld. Raym. ſays, this caſe is miſ-reported in Salk. Forteſc. Rep. So. Fitzgib. 26.

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This was the opinion of THE COURT upon the firſt argument, but no judgment was given, for they took time to conſider, and ordered a ſecond argument.

And afterwards, in *Eaſter Term*, in the eleventh year of *George the Firſt*, it was argued again.

THE COUNSEL *for the plaintiff in error* inſiſted, that the ſiſters had only an eſtate for life; and this depended upon ſuch conſtruction as the Court ſhould make of the word "iſſue," which is no legal word of limitation; therefore it cannot be a limitation in a will otherwiſe than by intendment; and if ſo, then it muſt be ſhewn on the other ſide that the teſtator intended it as a limitation; and in the caſe of *King v. Melling* before-mentioned, the argument of the *Lord Chief Juſtice* HALE was founded on the intent of the teſtator; but in * that caſe it was neceſſary to give a power to make a jointure, in order to continue the eſtate-tail undeſtroyed.

* [261]

Now in the principal caſe, there being an expreſs eſtate deviſed to the ſiſters for life, thoſe concomitant clauſes, *viz.* the giving them power to raiſe five hundred pounds by digging coal or ſelling timber, and reſtraining them from committing waſte, ſhew, that the teſtator intended they ſhould have an eſtate for life only; for if he had intended an eſtate-tail, ſuch a power and ſuch a reſtriction had been impertinent and void; ſo that taking the whole matter together, it ſhews that the teſtator did not want advice in making this will; therefore it ought not to have ſo liberal a conſtruction as otherwiſe it would, if there had been no ſuch clauſes to lead the judgment of the Court, and to explain the intention of the teſtator. A deviſe to his ſon for life, *et non aliter*, and to his ſons, was adjudged an eſtate for life only in the ſon. So in the caſe of *Backhouſe v. Wells*, in the ninth year of *Queen Anne*, a deviſe to *T. S.* for life only, without impeachment of waſte, and if he died leaving iſſue, then to ſuch iſſue and the heirs of ſuch iſſue, was adjudged an eſtate for life only. It is manifeſt, that the words "iſſue or "iſſues" in a will may be words either of limitation or of purchaſe; but in this will, the words being, "if the ſiſters die leaving "iſſue of their bodies, then in truſt for ſuch iſſue or iſſues, or "elſe for the ſurvivor or ſurvivors of them;" there the word "ſurvivors" ſhews, that the teſtator intended the words "iſſue or "iſſues" to be words of purchaſe, becauſe that word muſt neceſſarily relate to the word "iſſue," and then the ſentence would be thus, "in truſt for the iſſue or iſſues, and the ſurvivors of them;" it could not be in truſt for the ſiſters and the ſurvivors of them, becauſe there were two and no more, and there can be no ſurvivors between two.

2. Stra. 731. 10. Mod. 181. Eq. Caſ. Abr. 184. pl. 27. Gilb. Caſ. 20. 129. Fortеſc. Rep. 65. 75. 133. Fitzgib. 12. 22.

Then (*a*) *Hilly and Taylor's Caſe* was cited, which is reported in *Cro. Eliz.* by the name of (*b*) *Clerke v. Day*, which was thus, *viz.* The huſband deviſed the lands to his wife for life; and that if ſhe married after his deceaſe, and had any heirs of her body, then after her deceaſe that heir ſhould have it, and the heir of the body

(*a*) Owen, 148.

(*b*) Cro. Eliz. 313. pl. 5. Moor, 593. Roll. Abr. 832. K. Fitzgib. 24.

of

of ſuch heir; and if ſhe died without iſſue, remainder over; and it was adjudged, that the wife had only an eſtate for life, becauſe the words "if ſhe die without iſſue" being grafted on the word "heir," do plainly ſhew, that the word "heir" was uſed as a deſignation of the perſon, and not as a limitation of the eſtate; and that * immediately upon the death of the wife, the inheritance veſted in the heir by purchaſe. SHAW againſt WAY. * [262]

IT WAS ARGUED *for the defendant in error*, that the ſiſters were tenants in common in tail general, becauſe the words equally to be divided make a tenancy in common in a will: as for inſtance; where a deviſe was to his three ſons and their heirs, and to the longeſt liver of them, to be equally divided between them, &c. it was adjudged, that this laſt clauſe made them tenants in common: and here the deviſe was to his ſiſters "equally between them during "their lives; and if they die leaving iſſue or iſſues of their bodies, "then to ſuch iſſue or iſſues;" which word "iſſue" is as proper a word in a will to create an eſtate-tail as the words "heirs of the "body" are in a deed; and it is the only word in the ſtatute *de Donis* to deſcribe the heirs of the body, *viz.* where lands are given to one and the heirs of his body, upon condition that if he die without iſſue the lands ſhall revert to the donor, the donee after iſſue had power to diſinherit the iſſue, &c. therefore if the word "iſſue" be equivalent with "the heirs of the body," it certainly makes an eſtate-tail. And ſo is *Sonday's Caſe* (*a*): A deviſe to his wife for life, and after her deceaſe to his ſon *William*, and if he marry and has iſſue male, then his ſon to have it; and if he has no iſſue male lawfully begotten on his body, then to *Samuel* in like manner; and if any of his ſons, or their heirs males, iſſue of their bodies, go about to alien, then the next heir to enjoy it: *William* ſuffered a common recovery, and declared the uſes to himſelf and his heirs; and it was adjudged good, becauſe he had an eſtate-tail; for theſe words, "if he hath no iſſue male," make an eſtate-tail, which in this caſe was farther enforced by the ſubſequent words, "if they go about "to alien," which had been impertinent if an eſtate for life had been intended, becauſe in ſuch caſe they could not alien. Bleſſet v. Canwell, 3. Lev. 373. Weſtm. 2. c. 1. anno 13. *Edw.* 1

AS TO THE THIRD POINT, that the plaintiff in error ought to recover for a moiety, becauſe one of the ſiſters, *viz. Anne Lunsford*, had done no act to prejudice him, and that the ſiſters did not take by croſs-remainders; for ſuch ſhall never be raiſed by (*b*) implication, but where there is an abſolute neceſſity it ſhould be done.

TO WHICH *it was anſwered*, that the ſiſters took by croſs-remainders by that clauſe, *viz.* "if both his ſiſters ſhould die without "iſſue," &c.: now upon the death of one, the whole is veſted in the other by way of croſs-remainder by * implication; and that *Ravenſcroft Gifford* ſhall have nothing by implication till both the ſiſters are dead without iſſue, and without doing anything to bar the remainder. * [263]

AS TO THE FIRST and THIRD points, THE COURT was very clear in opinion, as they were upon the firſt argument; and as to THE THIRD

(*a*) 9. Rep. 127. Sonday's Caſe. (*b*) Cro. Jac. 655. pl. 6. Gilbert v. Witty.

SHAW, *againſt* WAY.

POINT they held, that where an eſtate is limited to the heirs of the body, or to the iſſue of one upon the deceaſe of another to whom it is expreſsly deviſed for life, this is an eſtate-tail, becauſe the law ſupervenes the intent of the teſtator; and this was the caſe of *King v. Melling*. But of late the courts have not gone ſo far as they did formerly to ſupervene the intent of teſtators, as in the caſe of *Backhouſe v. Wells*, in chancery, in the LORD PARKER's time, which caſe differed from that of *King v. Melling* but in one word, which was the word *only*: as for inſtance; *Melling's Caſe* was a deviſe to one for life, and after his deceaſe, to the iſſue of his body by a ſecond wife; this was adjudged an eſtate-tail: and *Backhouſe's Caſe* was, A deviſe to one for life *only*, and if he die without iſſue, remainder over; this was adjudged an eſtate for life, becauſe of the word *only*. Now in the preſent caſe, if the word "iſſue" is a limitation, it is an entail; but if it be by way of deſcription who ſhall take, it is but an eſtate for life; and here the words are, "if the ſiſters happen to "die, leaving iſſue or iſſues of their bodies, then in truſt for ſuch "iſſue or iſſues;" if the teſtator had reſted there, and gone no farther, this had been a plain eſtate-tail; but he goes farther, and ſays, "or elſe in truſt for the ſurvivor or ſurvivors of them;" which words ſhew, that the teſtator intended the word "iſſue" to be a word of purchaſe, and not of limitation, becauſe the word "ſurvivors" muſt relate to the word "iſſue," for there cannot be any ſurvivors between two, and therefore it could never relate to the ſiſters; and this was what made the doubt.

ONE OF THE JUDGES held it an eſtate only for life: he agreed, that the word "iſſue" in a will was a good word either of limitation or purchaſe, and that it was the intention of the teſtator which made it either the one or the other; now in this caſe it ſeemed, that by the concomitant clauſes the teſtator intended an eſtate for life to the two ſiſters, and no larger an eſtate; and therefore to conſtrue it an eſtate-tail would be to control the intention of the ſaid teſtator.

TWO JUDGES were of opinion, that it was an eſtate-tail.

THE CHIEF JUSTICE doubted.

*[264]

Caſe 182.

* The King *againſt* Pollard.

New trial was never granted in another Term, after the ſigning a judgment.

S. C. 2. Ld. Ray. 1370. S. C. 2. Seſſ. Caſes, 10.

THE DEFENDANT was found guilty as acceſſary to the buying and receiving of ſtolen goods.

It was moved to ſet aſide the verdict, and to have *a new trial* granted, becauſe *the principal* was ſince tried for the ſame fact, and acquitted, at THE OLD BAILEY.

It was argued, that where *the principal* is not guilty, *the acceſſary* cannot be guilty (*a*), eſpecially in this caſe, he being found guilty

(*a*) Indictment for a miſdemeanor in receiving ſtolen goods, knowing them to be ſtolen: it appeared in evidence, that the principal felons had been convicted and executed; whereupon it was objected, that the indictment would not lie, being only given in caſe the principal felon could not be apprehended; for ſect. 6. begins, "Provided always, that if, &c." which is only a juriſdiction given under thoſe particular circumſtances; and of this opinion was PRATT, *Chief Juſtice*, and the defendant was acquitted. The King v. Wild, Sel. Caſ. of Evid. 57.—NOTE *to the former edition.*

upon

upon the teſtimony of the principal. The ſtatute 5. *Anne*, c. 31. ſ. 5. & 6. enacts, "That it ſhall be lawful to proſecute perſons "buying and receiving ſtolen goods, knowing them to be ſtolen, "as for *a miſdemeanor*, and to puniſh them by fine and impriſon-"ment, though the principal felon be not before convicted. "And if ſuch principal felon cannot be taken, yet it ſhall be "lawful to proſecute and puniſh any perſon knowingly buying "goods ſtolen by ſuch principal, &c." Now, by this ſtatute, power is given to proſecute the acceſſary, but that is where the principal cannot be taken; now here he was not only taken, but appeared and gave evidence againſt the acceſſary; therefore the defendant moved for a *new trial*.

BUT IT WAS DENIED, becauſe the judgment being ſigned of another Term, the motion was not proper until it was referred to a Maſter to report, whether it was regular, or not.

THE MASTER afterwards reported, that the judgment was regular, but that it being only an interlocutory judgment, the defendant, by the courſe of the court, and by ſeveral precedents, might move *in arreſt of judgment* in another Term, but that he never knew a motion for a *new trial* in another Term, after judgment ſigned in a former Term (*a*).

BUT THE COUNSEL *for the defendant* inſiſted upon the granting a *new trial*; for the ſame reaſon which will warrant a motion in arreſt of judgment will likewiſe warrant the like motion for a new trial.

THE COURT demanded of the Counſel, whether they could ſhew a motion was ever made for a new trial, and granted at another Term, after the ſigning of an interlocutory judgment; and that if they could not ſhew that ſuch a motion * was made and granted, it ſhould not be done in the preſent caſe. * [265]

TO WHICH *it was anſwered*, that the Counſel on the other ſide could not ſhew any precedent where ſuch motion was made and denied; and if ſuch a motion was never made, the merits of the caſe muſt be the guide to determine it now; for if there are not

(*a*) It was held, that a new trial could not be moved for at all after the interlocutory judgment was ſigned; and that there was no difference between a motion in the ſame Term, and a motion in another Term; and this caſe was cited as an abſolute determination in general, without any ſuch diſtinction, by FILMER: and LEE, *Chief Juſtice*, ſaid, his note had no ſuch diſtinction. MS. Rep. Mich. 12. *Geo.* 2. B. R. The King *v.* Armſtrong. The rule-book hath been ſearched, by which it appears, that the firſt motion in this cauſe was made the ſame Term, and all things ordered to ſtay; therefore there is no foundation for the above diſtinction: but THE COURT held, that this motion might be received, even in another Term, yet that was upon a ſuppoſition, that nothing had been done ſince verdict; and that ſigning judgment was the material act, which had made all attornies-general ſign the judgment as ſoon as they could by the rules of the court. 2. Stra. 1102. We preſume, that the above inaccuracy in *Pollard's Caſe* occaſioned MR. JUSTICE FOSTER to ſay, it was wretchedly reported: this imputation, we hope, is now removed.—NOTE *to the former edition*.

THE KING *against* POLLARD.

any precedents againſt it, then the ſame reaſon which will warrant a motion in arreſt of judgment will warrant this motion for a new trial.

But THE COURT denied a new trial, becauſe no precedent could be produced, that it was ever granted in another Term after the ſigning the judgment.

In an indictment on 5. *Anne*, c. 31. ſ. 5. againſt a receiver of ſtolen goods for a miſdemeanor, it is not neceſſary to aver, that the principal had not been taken.

1. Sid. 303.
2. Hawk. P. C. c. 25. ſ. 112.

Thereupon IT WAS MOVED *in arreſt of judgment*, for that the indictment was ill, for the ſtatute which gives a power to proſecute the acceſſary, though the principal be not before convicted, makes ſuch a proſecution lawful "where the principal felon can-"not be taken," which are the very words of the ſtatute: now this indictment ſhould have ſet forth, that the principal could not be taken; which being omitted it is wrong, and conſequently the judgment ſhould be arreſted, the indictment not purſuing the ſtatute, which is the warrant in this caſe.

ON THE OTHER SIDE *it was ſaid*, that the ſtatute makes the proſecution againſt the acceſſary lawful where the principal felon is not "before convicted," and not only where he could not "be "taken *(a)*."

So the objection againſt the indictment was over-ruled *(b)*.

In *Michaelmas Term* following, the defendant was brought up by *habeas corpus*, and had ſentence to ſtand in the pillory at THE ROYAL-EXCHANGE, and to be impriſoned for a year.

(*a*) Attempts have been made, under various ſhapes, to proſecute the receiver as for a miſdemeanor, while the principal hath been in cuſtody, and amenable, but not convicted; but the late MR. JUSTICE FOSTER thought, that all devices of that kind were utterly illegal; for the ſtatute 1. *Anne*, ſeſſ. 2. c. 9. in the ſtrict letter of it, ſeemed to be confined to the ſingle caſe of the non-conviction of the principal, yet the ſubſequent ſtatute, in order to make them both conſiſtent, muſt be underſtood as explanatory of the former, ſince both acts plainly provide againſt one and the ſame miſchief, viz. where the principal abſconded, and was not amenable to juſtice; which the preamble of both ſhew to have been the miſchief in the contemplation of the Legiſlature at the time they were made. Foſt. Diſcourſe of Accomplices, 373, 374. The opinion ſaid to have been given in this caſe, as reported 2. Ld. Raym. 1370. weigheth very little with MR. JUSTICE FOSTER, and if taken in the latitude the words ſeem to imply (in the opinion of that Judge) is not law. "Where" (ſays the ſame able Judge) "the principal is amenable, the "proſecutor hath an option whether to "proceed againſt the receiver as for "felony or miſdemeanor, he muſt pro-"ceed as for felony; if he be not ame-"nable, and the proſecutor chuſeth to "wait for his conviction, he may do ſo, "and then proceed againſt the receiver "as for felony; or at his own pleaſure, "as for a miſdemeanor, without waiting "until the principal ſhould be amena-"ble:" under theſe limitations, and theſe only, as JUSTICE FOSTER conceives, the proſecutor hath an option. "Beſides" (continues that Judge), "the "judgment of the Court in that caſe "doth not appear to be founded on the "opinion ſuppoſed to have been then "given as the ruling principle, but on a "much ſtronger and more rational mo-"tive. The Court would not, upon "motion, arreſt judgment upon an "exception to the indictment which was "never taken before, and which muſt "overſet every judgment that had been "given on the ſtatute. This was a ſolid "and rational principle, founded in "political juſtice. For in caſes of this "kind, *communis error facit jus.*" Foſt. Diſc. on Accompl. 374.—NOTE *in the former edition.*

(*b*) See REX *v.* J. Baxter, 5. Term Rep. 83. in point.

Jenny

Jenny *againſt* Heale.

Caſe 183.

UPON A WRIT OF ERROR of a judgment given in the common pleas the caſe was thus: The plaintiff *Jenny*, in the year 1720, ſold his lands to the defendant, who gave him *a bill* for the price or value thereof in theſe words, directed to one *Pratt*: "SIR, You are to pay to *Mr. Jenny* ſo much, &c. out of the "money belonging to the Governors and Company of *Devonſhire* "*Miners*, *&c.*;" and the money not being paid, the plaintiff *Jenny* brought his action in the common pleas upon this *note*, as *a bill of exchange*; and on demurrer the plaintiff had judgment.

A bill in theſe words, "SIR, "*You are to pay* "*to Mr. A.* "1000*l. upon* "*demand, out of* "*the money in* "*your hands be-* "*longing to the* "*Governor and* "*Company of the* "*Devonſhire* "*Miners*," is not a *bill of exchange* within the cuſtom of merchants.

* But now the defendant in the original action brought a writ of error.

IT WAS ARGUED *for the plaintiff* in the action, that this is a good *bill of exchange*, for it has all the qualities of ſuch a bill, that is, it has three perſons, the *drawer*, the *payer*, and the *drawee*; and a ſet form of words is not neceſſary in bills of exchange, nor is it neceſſary that it muſt be between merchants. And for this the caſe of *Bellaſis v. Heſther (a)* was cited, where the objection was, that the cuſtom of merchants was not ſet forth in the declaration, but only that the defendant and one *Greevſon* were perſons *negotiantes* in merchandize, and that *Greevſon* drew a bill on the defendant, payable to the plaintiff *ſecundum uſum mercatorum*; and this was held good; and that to ſet forth the cuſtom at large would be ſurpluſage; neither is it neceſſary to ſhew that it was between merchants. As the drawing or ſigning every bill of exchange implies a conſideration for ſo doing, ſo the expreſſing that the money ſhould be paid out of any certain fund does not make it worſe; and though it may be objected, that this is only a direction to the caſhier to pay the money, yet it is ſtill a bill of exchange.

S. C. 2. Ld. Ray. 1361. S. C. 1. Stra. 591. 2. Ld. Raym. 1482. 1563. 10. Mod. 294. 316. Forteſ. Rep. 281. 2. Ld. Raym. 1481. 1563. Bailey on Bills, 3. Hard. 445. 3. Will. 207. 1. Bl. Rep. 782.

ON THE OTHER SIDE *it was ſaid*, that this was not a good *bill of exchange*; for ſince the bare ſigning a bill implies a conſideration in the perſon ſigning (who is the drawer), which being contrary to the ancient law, the plaintiff ought to ſhew, that the defendant ſigned this bill as a bill of exchange, or as a negotiable bill, for the riſe and progreſs of theſe bills was admitted and introduced for the eaſe and accommodation of trade. If the Governors of the *South-Sea Company*, or of the *Bank of England*, had ſigned a note in this form, which is no more than an appointment or direction to their caſhier to pay money, this would not bind them: now, the reaſon why bills of exchange charge the drawer is, becauſe he has ſome conſideration for drawing the bill; but in the preſent caſe the drawer had no conſideration; beſides, it is a contingent bill, it being payable out of the money belonging to the *Devonſhire mines*: now, if the caſhier had not money ſufficient to pay and diſcharge this note, and for that reaſon had refuſed to accept it, certainly he

(a) Lutw. 1589.

JENNY *againſt* HEALE.

could not be charged for non-acceptance, becauſe he was only to accept if he had money belonging to the *Devonſhire mines*. * In all the old bills of exchange, the words "value received" are inſerted, though now not (*a*) neceſſary; and the want of thoſe words was the only objection inſiſted on in the court of common pleas, on the demurrer to the declaration; and the form of the bill was not ſo much as mentioned. Beſides, it does not appear that this bill did relate to trade (though that is not neceſſary); but where the contrary appears, it cannot be a bill of exchange.

THE COURT. This note is no more than a direction or appointment to the caſhier to pay the money, and does not anſwer the neceſſity of trade; for it is not negotiable as a bill for money, therefore it would be inconvenient to charge the drawer; for if he might be charged on ſuch a note, then any man who gives his (*b*) ſteward an order or authority to pay money might be charged for non-payment. Beſides, it is the ſubſtance of the drawer which is always conſidered in bills of exchange, for it is that which makes them negotiable; but this new invention of drawing bills on caſhiers to pay money out of funds makes no difference between the beſt and worſt man as to his ſubſtance. It is true, there are three perſons named in this note, of which the caſhier of the Company is one; and this is all which makes it like a *bill of exchange*, though there are ſuch bills between two perſons, as where they are made payable by themſelves, for ſo are *goldſmiths notes*: now if this note had been accepted by the caſhier, and he had died without paying the money, certainly his executors could not be charged. It is true that cuſtom has carried *bills of exchange* a great way, but never ſo far as to make them payable out of any particular fund.

And for theſe reaſons the judgment in the common pleas was reverſed (*c*).

(*a*) 1. Show. 4. Fort. 282. Bar. K. B. 88.

(*b*) Such an order to a ſteward to pay out of the drawer's rents is good.

(*c*) See Joſſelin *v.* Laſſere, 10. Mod. 294. 316. Banbury *v.* Liſſet, 2. Stra. 1211. Pearſon *v.* Garrett, Skin. 398. Comb. 227. Beardſley *v.* Baldwin, 2. Stra. 1151. Roberts *v.* Peake, 1. Burr. 325. Dawkes *v.* Delarain, 3 Wilſ. 207. 2. Bl. Rep. 782. Kingſton *v.* Long, Bailey, 71. Peirſon *v.* Dunlop, Dougl. 571. Carlos *v.* Tancourt, 5. Term Rep. 482.—See alſo Kyd on Bills of Exchange, 31 to 36.

Caſe 184. The King *againſt* Ludlam, Chamberlain of London.

A bye-law of the city of *London*, "That every "perſon uſing "the trade of *a joiner* ſhall be free of the *Joiners Company*, and that every apprentice to a joiner ſhall forfeit "ten pounds if he be admitted to the freedom of any other Company," is good; but if a perſon who has ſerved an apprenticeſhip to *a merchant-taylor* uſe the trade of *a joiner*, the Court will grant a *mandamus* to the *Joiners Company* to admit him to his freedom, in order to avoid the penalty.—S. C. Stra. 675.

UPON a *mandamus* to admit *George Warren* to his freedom of the city of *London*, he having ſerved an apprenticeſhip to the warden of the *Company of Merchant-Taylors*;

THE

THE CHAMBERLAIN made a return of the cuſtom of *London* to make bye-laws, and that a bye-law was made the nineteenth of *October*, in the ſixth year of *William and Mary*, that no perſon uſing the trade of a joiner ſhould be made free of any other Company but that of the joiners, with an expreſs prohibition to the Chamberlain to that effect; and that every perſon who had ſerved an apprenticeſhip to a joiner ſhould, upon notice, take up his freedom, with a penalty of ten pounds if he is admitted of any other Company; that this man has uſed the trade of a joiner: * wherefore he was never admitted.

THE KING *againſt* LUDLAM, CHAMBERLAIN OF LONDON.

* [268]

The queſtion was, Whether this is a good bye-law or not?

IT WAS ARGUED *againſt the return*, that it was not, becauſe the city of *London* for many ages paſt has been ſupplied with all their ſuperior officers out of the twelve great Companies, of which this of the merchant-taylors is one; and that *Warren* is free of that Company, and therefore he ſhall not be compelled to be free of any other. There are but two ways of being free, either *by birth* and *by acquiſition*, for every freeman's child is free of the ſame Company of which his father was free; and if ſuch child ſhould be of another trade, certainly he would not be obliged to purchaſe his freedom in another Company. Beſides this return is ill, for it is, that he who exerciſes the trade of *a joiner* in *London*, muſt take his freedom in the *Company of Joiners*, if ſummoned for that purpoſe; and it is not ſet forth that *Warren* was ſummoned.

ON THE OTHER SIDE *it was argued*, that this was a good bye-law, and well returned; that it was a bye-law founded upon a cuſtom, and confirmed by acts of parliament, and made by a great number of citizens (in common council aſſembled) to prevent abuſes and frauds in trade. And as theſe guilds and fraternities have obtained this freedom as an encouragement of trade, ſo no cuſtom ſhould be eſtabliſhed which is detrimental to it, as this cuſtom would be, that a man who is free of one Company, ſhall not be compelled to be free of another more ſuitable to his trade and employment.

IT WAS ARGUED *in reply* againſt this bye-law, that though all the cuſtoms of the city of *London* are confirmed by act of parliament, yet * whenever an unreaſonable cuſtom is returned, it is always adjudged void; now if *Warren's* being free of the *Merchant-Taylors Company* did ſcreen him or his work from the inſpection or inquiry of the *Joiners Company*, it might be reaſonable that he ſhould be admitted of that Company; but when it does not, there can be no manner of inconvenience of taking his freedom in another Company, and not in this; and ſo is the caſe of *Robinſon v. Groſcourt* (*a*), which has been already cited and unanſwered. It was thus: An action of debt was brought for ten pounds, forfeited upon the breach of a bye-law, which was, that every perſon

* [269]

(*a*) 5. Mod. 104.

exerciſing

THE KING *againſt* LUDLAM, CHAMBERLAIN OF LONDON.

exerciſing the occupation of muſic and dancing within the city of *London*, who ſhall have a privilege to be made free by patrimony, ſhall at the next court of aſſiſtants of the *Company of Muſicians*, after notice, accept and take the freedom of the ſaid Company, under the penalty of ten pounds; this was adjudged a void bye-law, for it has no cuſtom to ſupport it. It is true, the cuſtom was laid to be, that whoever is free of the City muſt be free of ſome Company; but that cuſtom does not oblige a man to be of any particular Company, but leaves it at large to be free of ſome Company: now in this caſe, though *Groſcourt* the defendant ſhould be intitled by birth, or by apprenticeſhip, to be free of a Company, yet he muſt likewiſe be free of the *Company of Muſicians*; ſo that this bye-law exceeds the cuſtom, and for that reaſon it was held void; and ſo ſhould this, and for the ſame reaſon.

THE COURT. The common-council have power to make any reaſonable bye-laws; and this in the principal caſe ſeems to be ſuch; for it was made to prevent frauds in trade, by ſubjecting a man to the inſpection of thoſe who underſtand the ſame trade, *viz.* the trade of *a joiner*, which the *Company of Merchant Taylors* does not; but the only queſtion which admits any doubt is, whether a man who is free of the *Merchant-Taylors Company*, and exerciſes the trade of *a joiner*, may demand his freedom in the *Joiners Company*; for if he may not demand it, then this bye-law is manifeſtly injurious to him, becauſe it takes away his right of freedom in one Company, and gives him no right to his freedom in another Company.

But by FORTESCUE, *Juſtice*, Certainly a bye-law which makes it penal for a man to exerciſe any other trade, entitles him to his freedom in the Company of the ſame trade; and it is a reaſonable bye-law which hinders men from exerciſing ſuch trades, and being free of ſuch Companies, who * have no knowledge in thoſe trades.

* [270]

RAYMOND, *Juſtice*. The caſe of *Robinſon v. Groſcourt* differs from this, becauſe in that caſe there was no Company of *Dancing-Maſters*, of which the defendant might be made free; and beſides, this caſe was never determined, but was adjourned by reaſon of another exception to the proceedings. Now this bye-law being agreeable to the conſtitution of the City, and not reſtraining trade, but rather regulating it, by ſubjecting ſeveral artificers to be under the inſpection of others who underſtand the ſame trade, which cannot be better done than by compelling them to take their freedom in a Company of that trade in which they are employed;

Therefore this was adjudged a reaſonable bye-law.

THE COURT. The freedom of the City cannot be taken from a man, provided he will take his freedom in a proper Company; and if that Company will not admit him, the Court will grant a *mandamus* to compel them; but on this return it appears, that every man who exerciſes the trade of *a joiner*, &c. within the city of

of *London*, ought to be free of the *Company of Joiners*; but it does not ſhew that the defendant did exerciſe that trade in the city, &c. but that he did exerciſe the trade of *a joiner* generally, without ſaying where, and then it might be at *York* or anywhere elſe; but it is his exerciſing it within the city of *London* which gives them juriſdiction. THE KING *againſt* LUDLAM, CHAMBERLAIN OF LONDON.

And for this reaſon it was adjourned (*a*).

(*a*) This caſe was argued again in Trinity Term 12. *Geo.* 1. and in the Michaelmas Term following the Court were all of opinion, FIRST, That this is a good bye-law, being made in regulation of trade, and to prevent fraud and unſkilfulneſs, of which none but a Company that exerciſe the ſame trade can be judges.—SECONDLY, That this does not take away the apprentice's right to his freedom, but only his election of what Company he ſhall be free, and directs him to the proper Company.—THIRDLY, That it being ſaid he *ſhall* take up his freedom in that Company under the penalty of ten pounds, he is entitled to a *mandamus* to prevent the forfeiture. S. C. 1. Stra. 676. and ſee the caſe of Harriſon *v.* Goodman, 1. Burr. 12. and Rex *v.* Sir Thomas Harriſon, 3. Burr. 1323. in which laſt caſe the above deciſion is recognized as law.

Aſhton *againſt* Blagrave.

Caſe 185.

IN AN ACTION ON THE CASE for ſcandalous words ſpoken of a juſtice of peace, there being a *colloquium* laid of the plaintiff, and of his office of juſtice of the peace, the defendant ſpoke the following words, "He," *meaning the plaintiff*, "is a raſcal, a vil-"lain, and a liar."

To ſay of a juſtice of the peace in the execution of his office, "*He is a* RAS-"CAL, *a* VIL-"LAIN, *and a* "LIAR," is actionable.

Upon not guilty pleaded the plaintiff had a verdict.

Upon a motion in arreſt of judgment, a rule was made that the plaintiff ſhould ſhew cauſe, &c. and now

S. C. 1. Stra. 617. S. C. Fort. 206. S. C. 2. Ld. Ray. 1369. 4. Bac. Abr. 489.

IT WAS MOVED for judgment, that theſe words were actionable, becauſe they convey an idea too mean, and very much unbecoming the office of a juſtice of peace, and the meaning of words is always to be taken according to common intendment; therefore the calling a man "*daffi-down-dilly*" and "*ambidexter*" was held actionable, though thoſe words import no crime in themſelves, but in common acceptation are applied to ſome crimes. * The ſignification of words is various: as for inſtance; it is now actionable to call a man "Jacobite" or "Papiſt," but it was not ſo in a late reign; therefore words muſt be conſtrued to be ſcandalous, or not, according to the common acceptation when they are ſpoken: but the words in the principal caſe did always import a meanneſs and ſcandal of the perſon of whom they were ſpoken; and there is a difference between ſpeaking of a juſtice of the peace, and ſpeaking of him in his office, as ſpecially laid in this declaration.

* [271]

IT WAS SAID *on the other ſide*, that theſe words are ſo foreign to the office of a juſtice of the peace, that though he is named, they cannot imply any ſcandal to his office, for none of them alone are actionable; the word "raſcal" is not, nor the word "villain," unleſs

ASHTON *againſt* BLAGRAVE.

unleſs ſome other words are added, as "ſtay the villain," or "ſeize "the villain;" neither is the word "liar" actionable; and if they are not actionable alone, they are not ſo when taken all together; and the rather, becauſe they are not of any certain ſignification. It is true, it is actionable to ſay of a juſtice of the peace, that he is "a coverer of thieves," becauſe this is againſt his oath as juſtice of the peace (*a*); but it is otherwiſe for calling him "rogue" or "varlet;" (*b*) and ſo it is to ſay "he is a vermin in the common-"wealth;" (*c*) neither is it actionable to call him "a fool," (*d*) "an aſs," (*e*) "a coxcomb," (*f*) "a buffle-head juſtice;" (*g*) ſo the words in this caſe are not actionable.

TO WHICH *it was anſwered*, that a juſtice of the peace has a double capacity, and that where it does not appear that the words were ſpoken of him as a juſtice, they may not bear an action, but where they were ſpoken of him relating to his office, they are actionable.

2. Ld. Ray. 1369, 1370. Stra. 618. Foſter. Rep. 207.

PRATT, *Chief Juſtice*, delivered the reſolution of the Court (*b*): That the words were actionable, they being laid to have been ſpoken of the plaintiff in the execution of his office, and ſo found: ſo that it is the ſame as if the defendant had ſaid, that the plaintiff is "a villain in the execution of his office," "a raſcal in the ex-"ecution of his office;" the words "raſcal" and "villain," ſpoken of a juſtice of peace, where a *colloquium* is laid of his office, import a ſcandal; for admitting thoſe words to be of an uncertain ſignification, yet they carry with them great ſcandal, and in common underſtanding import a vile and baſe man, and that he is ſo *in executione officii*, and are a great imputation againſt the plaintiff's integrity and behaviour in that office. But to ſay "he is a liar in "the execution of his office," is as much as to ſay, the juſtice of peace acts partially and corruptly in the execution of his office. He muſt give falſe judgments, knowing them to be falſe; for it cannot be a lie, unleſs he knows it to be falſe; and though it were a right judgment, and he thought it to be wrong, and ſo intended it, it would be partiality and corruption; and the ſcripture ſays, that "*a thief is better than a man accuſtomed to lying*;" and therefore none of the caſes cited come up to this caſe; ſo taken all together they are ſcandalous words.

See Sir John Hawkis's Remarks on Fitzherbert's trial, fol. 9.

And the plaintiff had judgment.

(*a*) Hob. 117. 4 Co. 16.
(*b*) 4. Co. 13. Moor, 141.
(*c*) 1. Roll. Ab. 57.
(*d*) 1. Lev. 52.
(*e*) 1 Sid. 67.
(*f*) 1 Salk. 695.
(*g*) 1. Lev. 52.
(*b*) This opinion was delivered on the 26th November, 1725, in Michaelmas Term, in the eleventh year of *George the Firſt*.

* Reynolds

* Reynolds *againſt* Clerk.

Caſe 186.

Tueſday, 16 *June* 1725.

TRESPASS *vi et armis* againſt the defendant for entering into the plaintiff's houſe and yard, and fixing *a ſpout* on his own houſe, for conveying the rain water from his houſe into the ſaid yard, *ratione cujus aqua currebat in ſtabulum* of the plaintiff, *et occaſione inde* rotted the timber; &c. whereas before the water dropped from the eaves of the defendant's houſe into the ſaid yard, and then did no damage, *ad damnum*, &c.

If a man has a right to the uſe of a yard in common with the owner, he does not commit *a treſpaſs* by entering into the yard in order to fix a water-ſpout to his houſe; but if any injury is done to the owner of the yard, in conſequence of fixing ſuch ſpout, he may recover *damages* in an *action on the caſe*.

S. C. 1. Sera. 334. 634. S. C. Forteſ. 212. S. C. 2. Ld. Ray. 1399. Fort. 211. Holt, 22. Eſp. Dig. 598. 2. Burr. 1113. 3. Burr. 1556. 1. Com. Dig. "Action on the Caſe" (A.). 1. Bac. Abr. 43. Dougl. 594 (573.). 6. Com. Dig. "Treſpaſs" (D.).

The defendant pleaded *not guilty* as to all, except entering the houſe and yard and fixing the ſpout on his own houſe; and as to that he juſtified, for that *T. S.* being ſeiſed in fee as well of the plaintiff's as of the defendant's houſe, which was adjoining to the yard belonging to the plaintiff's houſe, by indenture conveyed the houſe and yard to the plaintiff, with an exception in the deed of the free uſe of the yard, &c. to the ſaid *T. S.* and to all the tenants and occupiers of the defendant's houſe, which houſe was afterwards conveyed to the defendant; and averred that the ſpout ſo fixed was neceſſary for the uſe of the defendant's houſe, and ſo juſtified by virtue of that exception.

And upon a demurrer to this plea,

IT WAS INSISTED *for the plaintiff*, that this juſtification was not good, becauſe the ſpout was a nuſance to him; and though *T. S.* might juſtify the fixing it to one houſe, when both were in his poſſeſſion, yet when both were ſold to different perſons, one of them cannot juſtify for a nuſance done to the other (*a*); and in this caſe the defendant had neither an expreſs nor an implied power to ſet up any ſpout, eſpecially when it would be a nuſance to the plaintiff. The uſe of this yard reſerved to the defendant, is no more than *an eaſement* to his houſe, and not to be uſed to any other purpoſe; and the nature of a nuſance is ſuch, that if it be of neceſſity, that is, if it be neceſſary or beneficial to him who made it, and another buy the land in which the nuſance was made, in ſuch caſe the nuſance is purged; and if afterwards the lands come into different hands, it is not abatable; but if it is an unneceſſary nuſance, it is only a ſuſpenſion thereof when in one hand, and afterwards coming into different hands, it is abatable. But there are ſome privileges ſo very neceſſary as not to be extinguiſhed by *unity of poſſeſſion*, as paths to a mill, &c. for they ſhall revive as ſoon as the tenements come to different * hands again. Now, in this caſe the defendant having erected this nuſance after the tenements came to different hands, there can be no colour for him to juſtify.

* [273]

THE COUNSEL *for the defendant* took no notice of the objection made on the other ſide, but inſiſted, that the plaintiff was miſtaken

(*a*) Year Book 11. *Hen.* 7. pl. 25. Hob. 131. Poph. 166. 172. Dyer, 295. pl. 19.

in

REYNOLDS *againſt* CLERK.

in his action, becauſe *treſpaſs* would not lie for fixing a ſpout on his own houſe; but that if the plaintiff had any damage thereby, he ought to bring an *action on the caſe* to recover what he was damnified, for he had a licence to enter the yard, and could not be a treſpaſſer for entering and fixing the ſpout on his own houſe. Beſides, the defendant has averred in this plea, that the fixing this ſpout is for the neceſſary uſe of his houſe, which the plaintiff has confeſſed by the demurrer *(a)*; therefore, when he juſtified the entering into the yard, the conſequence thereof cannot be a treſpaſs.

SECONDLY, The conſequential damage in rotting the timber, is a deſcription and part of the original treſpaſs; for whatever comes under a *virtute cujus*, or a *per quod*, or *ratione inde*, cannot be traverſed, being no new charge, only a farther deſcription of the former charge *(b)*. The plea therefore is good, though it do not particularly anſwer the rotting of the foundation, ſince that is only aggravation.

THE REPLY *for the plaintiff*. It is now inſiſted on by the defendant, that the plaintiff has miſtaken his action, but not the defendant's innocence, and that an *action on the caſe* is the proper action for the plaintiff, which is very true, and ſo is a *quod permittat*; but yet *treſpaſs* is likewiſe a proper action; for it cannot be denied, but that the freehold and inheritance of this yard is in the plaintiff, and that the defendant has only the bare uſe of it, and by miſuſing it he is a treſpaſſer. It is true likewiſe, that the defendant had licence to enter the yard, but every licence muſt have a reaſonable conſtruction; for can it ever be intended, that becauſe he had leave to enter the yard, and had the uſe thereof, that he might juſtify the throwing down the plaintiff's houſe?

THE CHIEF JUSTICE, upon the firſt arguing of this caſe, ſaid, that this licence was granted by ſpecial words, ſo could not be ſo extenſive as otherwiſe it would have been; for the caſe is no more than a grant of the houſe and yard; and to except the yard would be void as to the freehold; therefore the exception muſt be intended to ſome particular purpoſe, as to the uſe thereof, to walk in, or to go to the pump, and in ſuch caſe he is to do no damage to the freehold; and if this licence be in any manner miſuſed, to the prejudice of him who has the freehold, he who miſuſes it is *a treſpaſſer*, as if he dig up the yard, &c. but the uſe which was made of it in this caſe, was to enter and fix a ſpout to his own houſe; now, though the original act was lawful, as done to his own houſe, yet he may be a treſpaſſer, when the immediate conſequence of ſuch an act is injurious to his neighbour; for * ſuppoſe a man has a water-courſe running through his ground, and his neighbour diverts it, this is no treſpaſs; but if, by diverting it, he turned it on his neighbour's houſe, it would be a treſpaſs. The *per quod* is only the deſcription of the treſpaſs.

*[274]

(*a*) 8. Co. 146. (*b*) 8. Co. 10. 1. Vent. 54. 340. T. Jones, 110.

For

For which reaſon THE CHIEF JUSTICE and ANOTHER JUDGE held this action of treſpaſs was a proper action: but TWO OTHER JUDGES were of a contrary opinion.

FORTESCUE, *Juſtice.* The defendant ought to have uſed the houſe as when both houſes were in the poſſeſſion of one man, then the water dropped from the eaves, and no ſpout was fixed; ſo that the fixing the ſpout is *a nuſance* to the plaintiff. I do not think the *per quod* to be merely a further deſcription of the treſpaſs, becauſe it was fully deſcribed before. The entry into the yard is no treſpaſs: a man having the uſe of a yard, may make all the common ordinary uſes of it. An action of treſpaſs is a poſſeſſory action, and muſt be founded on ſome act which diſturbs the poſſeſſion; this is not like the caſe of throwing filth, rubbiſh, &c. into a man's yard. Treſpaſs is where an act is done immediately to the prejudice of another (*a*): and an action on the caſe is founded on an act which mediately tends to the damage of another (*b*); and this ſeems the true difference between an action of treſpaſs and on the caſe, *Utere tuo ut alienum non lædas.* If one ſhooting at a bird deſtroy another's decoy, an action on the caſe only lies. In this caſe there is no immediate treſpaſs done; he might enter into the yard; he might fix a ſpout to his own houſe, and for the conſequent mediate damage ariſing from thence, an action on the caſe would have been the plaintiff's remedy.

Caſ. Temp. Holt, 16. 11. Mod. 73. pl 5. 130. pl. 10. 2. Kel. 273. pl 210. S. P.

RAYMOND, *Juſtice.* The affixing the ſpout was a lawful act; but ſince its conſequence is a nuſance to the plaintiff, the defendant is anſwerable for it. The only queſtion is, Whether an action on the caſe, or treſpaſs *vi et armis*, ought to have been brought? A diſtinction has been made between an act mediately or immediately prejudicing another. I remember the caſe of diverting a water-courſe mentioned by THE CHIEF JUSTICE, it was a Weſt Country cauſe, *Courtney v. Collett* (*c*). The plaintiff brought an action of treſpaſs *vi et armis*, for that the defendant having a water-courſe running through his land diverted the ſame, *per quod* the plaintiff's grounds were overflowed; after *not guilty* and a verdict for the plaintiff, it was moved in arreſt of judgment and inſiſted on, that an *action upon the caſe* was the proper remedy, ſince the original act of diverting the water-courſe being in his own land was lawful; but the Court held the action of

(*a*) See 1. Ld. Ray. 188. 272. 2. Wilſ. 313. 3. Wilſ. 409. 412. 2. Bl. Rep. 894. 897. 3. Burr. 1114. 1559. 2. Term Rep. 225.

(*b*) Cro. Eliz. 219. Cro. Jac. 446.

(*c*) LEE, who afterwards argued for the plaintiff, cited this caſe as follows, and ſaid he had it from *Serjeant Carthew's* notes. Hil. 9. *Will.* 3. Courtney *v.* Collett. Treſpaſs *vi et armis* by *Sir William Courtney quare clauſum fregit, et in ſolo ſuo cuniculum cepit; necnon de eo quod fregit et aſportavit* the flood gates, and opened the ſluices, *per quod* the water came upon the plaintiff's pool. After a verdict for the plaintiff, GOULD, *Serjeant*, moved in arreſt of judgment, becauſe the latter part of the declaration charged a fact proper only for an action upon the caſe. But by THE COURT, An action of treſpaſs is maintainable for the latter facts as well as for the firſt.—NOTE *to the former edition.*

treſpaſs

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treſpaſs maintainable, ſince the *per quod* could not be looked upon only as a deſcription of the treſpaſs (*a*), and accordingly the plaintiff had his judgment: which caſe is a full proof, that an action of treſpaſs may be brought where the original act was no treſpaſs; for diverting the water-courſe was not a treſpaſs immediately prejudicial to the plaintiff.

PRATT, *Chief Juſtice.* The better opinion then has been, that wherever a damage is done, the party damaged is at liberty to bring either an action of treſpaſs or an action on the caſe.

FORTESCUE, *Juſtice.* It ſeems odd to make a man a treſpaſſer, for doing a lawful act within his own grounds.

RAYMOND, *Juſtice.* If the act ſtops there, it is odd; not elſe.

Adjournatur.

Afterwards, in *Trinity Term*, in the eleventh year of *George the Firſt*, this point was argued again;

THE QUESTION being, Whether treſpaſs lies for entering his yard, and ſetting a ſpout on his own houſe?

IT WAS ARGUED, that it did not, but that an *action on the caſe* was the proper remedy. It was admitted, that where the original act is a wrong actually done, in ſuch caſe treſpaſs lies, but where the original act was lawful, and conſequential damages enſue, there an action on the caſe is the proper remedy. The complaint againſt the defendant is for a nonfeaſance, *viz.* for that he did not take care that this ſpout ſhould not damnify the plaintiff's houſe; and it is certain that treſpaſs will not lie for a *nonfeaſance*: if the defendant had undertaken to cure the plaintiff's horſe, and by his negligence the horſe had died, yet treſpaſs would not lie againſt him, though the horſe was the property of another man; but in this caſe the houſe was his own. The caſe of *Edwards v. Hullender* (*b*) is full in point, which was thus: The plaintiff had a cellar, and the defendant had a warehouſe over that cellar, on which he laid ſo great a burthen, that the floor broke and fell into the cellar and ſpoiled three butts of wine; and it was adjudged, that an action on the caſe, and not an action of treſpaſs, lay againſt the defendant.

*[275] * IT WAS ARGUED *for the plaintiff* that *treſpaſs* is the proper action; for though it was lawful for the defendant to fix the ſpout on his own houſe, yet he ought not to do it in ſuch a manner ſo as immediately to treſpaſs his neighbour; like the caſe of *Preſton v. Mercer* (*c*), which was treſpaſs *vi et armis* for cauſing ſtinking

(*a*) *Raymond*, when he afterwards delivered the reſolution of the Court on the ſecond argument, being then CHIEF JUSTICE, gave a different account of this caſe from what he does here, and declared that the above account given of it from his memory was miſtaken. Str. 635.

(*b*) Poph. 46. Cro. Eliz. 285. 2. Leon. 93.

(*c*) Hard. 60.

water

water in his yard to run to the walls of the plaintiff's houſe, and piercing them ſo that it run into his cellar; after a verdict for the plaintiff, it was moved in arreſt of judgment, that treſpaſs *vi et armis* would not lie againſt the defendant, becauſe a man cannot be a treſpaſſer with force and arms in his own ground; he ought to bring an action on the caſe; but judgment was given for the plaintiff.

TO WHICH *it was anſwered*, that the original act was a wrong done, *viz.* by cauſing ſtinking water to run to the walls of the plaintiff's houſe, which differs from the principal caſe, and ſo is no authority for the plaintiff.

RAYMOND, *Chief Juſtice.* The caſe of *Preſton v. Mercer* (*a*) was a proper action of treſpaſs, for the declaration charged that the defendant did *make* the water to run, which is an immediate *tort*. In the caſe of *Courtney v. Collett* (*b*) there was matter laid proper for an action of treſpaſs; the queſtion aroſe on what followed the *necnon*, whether it ſhould be taken as aggravation of the former treſpaſs, or as the deſcription of a new one, and by my notes it does not appear that judgment was ever given (*c*). The bounds of all actions ought to be preſerved; the right rule and diſtinction is, that where the act itſelf is unlawful and prejudicial, treſpaſs muſt be brought; but if the act is lawful, and only by conſequence a damage to the plaintiff, he muſt bring *caſe*. In the caſe of *Leveridge v. Boſcall* (*d*), which was treſpaſs on the caſe, the declaration was, that the plaintiff was poſſeſſed of a barn and a river adjoining; that the defendant dug two trenches, and thereby diverted the water of the river; and after verdict PRATT, *Serjeant*, moved in arreſt of judgment, becauſe the action ought to have been treſpaſs *vi et armis*; but the plaintiff had his judgment; for the declaration not ſpecifying in whoſe ground the defendant dug the trenches, it ſhall be preſumed to be in his own ground, and then, the firſt act being lawful, was no *tort* to the plaintiff; and the conſequential damage only affected the plaintiff, which was proper for treſpaſs on the caſe. I think this action is not maintainable.

POWYS, *Juſtice*, of the ſame opinion.

FORTESCUE, *Juſtice.* Treſpaſs upon the caſe, and treſpaſs *vi et armis*, are different in name and in their nature; for the one is called an action for a nuſance, and the other are called *actiones injuriarum*; the one muſt be brought for a wrong done immediately to the perſon or his poſſeſſion, the other for a conſequential damage. This action is brought for a wrong done to the poſſeſſion, but not immediately; becauſe the defendant had a right to come into the yard, and to fix a ſpout to his own houſe. If logs are laid in the highway by which any perſon is hurt, he muſt bring caſe (*e*); but if the hurt is received by logs thrown at the perſon, he muſt bring treſpaſs *vi et armis*. Caſe muſt be brought

1 Stra. 636.

(*a*) Hardres, 60.
(*b*) 1 Ld. Raym. 272.
(*c*) See 11 Mod. 164.
(*d*) Stra. 636. 2. Ld. Ray. 402.
(*e*) Stra. 636.

REYNOLDS *againſt* CLERK.

for making ſluices in a man's own ground, by which my land is overflowed (*a*). The objection to the caſe of *Courtney v. Collett* was, that treſpaſs *vi et armis* and treſpaſs *on the caſe* could not be joined in one declaration; no judgment was given that I can find in my notes; in ſome caſes I think thoſe two actions might be joined. It not appearing in that caſe whoſe the flood-gates were, they might be the defendant's own, and then treſpaſs on the caſe ought to be brought. In this caſe the fixing the ſpout was lawful; ſo was the entering the yard by virtue of the reſervation which gives a right to uſe the yard as well as the pump, &c.

REYNOLDS, *Juſtice*, of the ſame opinion.

Judgment for the defendant (*b*).

(*a*) 1. Roll. Abr. 104.
(*b*) See Gates *v.* Bayley, 2. Wilſ. 313. Scott *v.* Shepherd, 2. Bl. Rep. 892. Hawker *v.* Birbeck, 2. Burr. 1556. Morgan *v* Hughes, 2. Term Rep. 225.

Caſe 187.

Waddy *againſt* Newton.

Where the acres mentioned in a fine or common recovery ſhall be taken by computation, and not by the ſtatute *De Terris Menſurandis.*

UPON a ſpecial verdict in ejectment, the caſe was thus:— Tenants in tail covenanted to levy *a fine* and ſuffer a *common recovery* of the lands now in queſtion, and of a fiſhery; and accordingly levied the fine thereof by the name of one hundred and twenty acres of land in *Stockwell-hall*, in the county of, &c. and of ten acres *aqua cooperta*; and declared the uſe thereof to himſelf and his heirs. * But there being many more than one hundred and forty acres ſtatute meaſure, the defendant, who was heir in tail, would conteſt the right to all above thoſe hundred and forty acres.

* [276]

The plaintiff thereupon brought an ejectment, and ſuggeſted that the whole eſtate was computed to be one hundred and forty acres by the common computation in the country, &c. and upon *not guilty* pleaded the jury found a ſpecial verdict.

They found that the fine was levied and the recovery ſuffered by the name of one hundred and twenty acres of land, and of ten acres *aqua cooperta*; and that the whole eſtate entailed was computed in the country to be one hundred and forty acres of land.

IT WAS INSISTED *for the plaintiff*, that all the entailed lands were compriſed in this fine by the name of one hundred and forty acres of land; and this by the intent of the tenant in tail who levied the fine; that computations are to be aſcertained by a jury, according to how much it is reputed to be in the country where computations are made, and that they are tied down to the very country where the things are tranſacted; therefore where an *habere facias poſſeſſionem* is directed to the ſheriff to put a man in poſſeſſion of twenty acres, he muſt deliver twenty acres to him according to the uſage of the country where the lands lie. So where tenant in tail of the manor of *Lavington*, and of two cloſes reputed parcel thereof, levied a fine and ſuffered a recovery of the manor, with

with the appurtenances (*a*); now though the two cloſes were only parcel of the manor in reputation, yet they were adjudged to paſs; becauſe it was intended by the parties that they ſhould paſs. The fiſhery likewiſe paſſes by the name of ten acres *aqua cooperta*; for it is demandable by that name in a *præcipe* (*b*), which is a real action; and ſo it is in *an aſſiſe* (*c*); and if a real action will lie for it, certainly an ejectment will.

THE COUNSEL *for the defendant.* It is not pretended that this computation is the common way of meaſuring lands by the cuſtom of the county or hundred, but only by the cuſtom of *Stockwell-hall*, in the county of, &c. and it will be very difficult to know how far that extends; ſo there being no manner of certainty to fix the cuſtom, the plaintiff can never get over the ſtatute *De Menſurandis Terris* (*d*); but the Court will judge of the number of acres compriſed in this fine and recovery, according to that ſtatute, as a certain rule to direct their judgment. * Now by that ſtatute, an acre of land containing ten perches in length, muſt be ſixteen perches in breadth; and ſo on; therefore theſe hundred and forty acres compriſed in this fine, muſt be according to that meaſure, and not left to an uncertain computation; and there is a difference between a manor which is fixed to no certain meaſure, and a quantity of acres where the meaſure is aſcertained by the ſtatute. It is true, if it was the cuſtom of the county or of the hundred, ſo as it was limited or fixed to a certain place, this method of computation might be good; as an acre in *Cornwall*, or a perch in *Staffordſhire*; becauſe the public uſage of the county gives it a ſanction; and there are ſome law books (*e*) which prove that the meaſure in thoſe counties is different from all other places in *England*; and ſo are the prices of the things meaſured. But in the preſent caſe, the acres, if taken by computation, are two-fifths larger than the common or ſtatute meaſure, without confining ſuch computation to any certain place; and in all the caſes wherein it is mentioned, what paſſed by ſuffering a recovery of a manor in reputation, it is alledged in the deed, that the covenantor is to ſuffer a recovery of a reputed manor; but it is not ſet forth in this deed, that the covenantor was to ſuffer a common recovery of ſo many acres in reputation, but only of one hundred and forty acres generally. Beſides there is a difference between a fine levied and a recovery ſuffered in purſuance of a contract for a valuable conſideration, and a voluntary fine and recovery as this is; for in the one caſe, the prior agreement governs the whole; but where there is no ſuch agreement, the ordinary courſe of law is to be the guide, and no ſtrained conſtruction ſhall be deduced from the intention of the parties. And it is to be obſerved, that the ſtatute *De Terris Menſurandis* was made on purpoſe to aſcertain the fine due to the king,

* [277]

(*a*) Thyn v. Thyn, 1. Vent. 51. S. C. 1. Lev. 27. S. C. 1. Sid. 190. S. C. 1. Mod. 190.
(*b*) 2. Mod. 239.
(*c*) 2. Inſt. 42.
(*d*) 34. *Edw.* 1. c.
(*e*) Cromp. Juriſ. 222.

WADDY *against* NEWTON.

by alienation of lands by fines, and therefore such a loose computation of the number of acres shall not avoid the design of this statute; and if so, then where a man covenants to levy a fine of five hundred acres of land, certainly it must be intended statute acres.

Ejectment will not lie of a fishery.

As to the fishery, the plaintiff has no colour to have judgment, because an ejectment will not lie of a fishery, nor in any case but where there may be an entry and expulsion; and that cannot be of

* [278]

a fishery, especially in this case where * it is of a fishery in the river *Tyne*, which cannot pass by the name of so many acres *aqua cooperta*, because it is not like a pond where the very soil is the property of another; but this is only a freedom to fish in that river.

THE COURT. It is admitted by the Counsel for the defendant, that if this fine had been levied, and a recovery suffered, in pursuance of a former agreement or covenant for a valuable consideration, and that it had appeared to be the intent of the parties to pass the whole estate by the name of one hundred and forty acres, in such case the whole would pass. Now here the jury has found that the whole estate entailed, was computed in the county to be one hundred and forty acres; and it will be difficult to apprehend a difference between a covenant for a valuable consideration, and a voluntary covenant; for it cannot reasonably be said, that the same words shall pass all the lands in one case, and shall not pass the whole in the other case, especially when the tenant had it in his power to pass it as he pleased.

But THEY HELD that an *ejectment* would not lie of a *fishery* (*a*); so the defendant must have judgment as to that matter.

But because THE CHIEF JUSTICE who tried this cause, did believe that the defendant was surprized by the finding of the jury, that the whole estate tail was computed in the country to be one hundred and forty acres, they would not tie him down to this verdict, but admit him to bring a new ejectment to try the truth of that matter, and that they would consider of the judgment until next Term; but recommended it to the parties to agree in the mean time.

(*a*) See Herbert *v.* Langbane, Cro. Car. 492. that an ejectment will not lie *de piscaria* in such a river, because it is only a profit *à prendre*, but that it will lie *de terra aqua cooperta*.

Case 188.

Serle *against* Barrington.

Thursday, 18 *June*, 1725.

In debt by an executrix on a bond of thirty-five years standing, if the defendant plead *ple. it ad diem*, and rely upon the presumption of law that the bond is paid, being more than twenty years old, the plaintiff may rebut that presumption by shewing an indorsement of the payment of interest for one year, after the bond was nine years old, written in the hand of the testator.—S. C Eq. Abr. 414. S. C. 2 Stra. 826. S. C 2. Ld. Ray. 1370. S. C. 3. Peer Wms. 397. S. C. 3. Bro. P. C. 535. 6. Mod. 22. 1. Burr. 434. 4. Burr. 1963. 1. Term Rep. 270.

THIS was an action of debt brought by an executrix upon an old bond for money due to the inteſtate; and upon *oyer* of the bond, and the condition thereof, it appeared to be dated in the

ninth

ninth year of *William the Third*, which was thirty-five years paſt; and thereupon the defendant pleaded *ſolvit ad diem*; upon which they were at iſſue. SERLE *againſt.* BARRINGTON.

At the trial the defendant offered to prove the iſſue by preſumption (*i. e.*), this being a bond of more than twenty years ſtanding, and no intereſt being paid in all that time, it muſt be preſumed that the principal was paid on the day.

* To encounter this preſumption, the plaintiff offered to give another preſumption in evidence, and that was an indorſement of the payment of intereſt for one year after the bond was nine years old, which indorſement was written with the teſtator's own hand. * [279]

THE QUESTION was, Whether that ſhould be given in evidence at the trial.

It was proved that after the death of the teſtator, this bond was found amongſt his papers, and that the teſtator was eſteemed an honeſt man. No evidence was given to prove, whether the indorſement was made by the obligee or obligor, or that this indorſement was ever ſeen by any perſon.

Upon which the plaintiff was *nonproſſed.*

PRATT, *Chief Juſtice*, ordered, that this matter ſhould be referred by way of a caſe ſtated for the opinion of the Court.

IT WAS ARGUED *for the plaintiff*, that though it is a general rule, that no man can be evidence in his own cauſe, yet where the neceſſity of the caſe requires it, he ſhall be a witneſs; as on the *ſtatute of Winton*, where the perſon robbed is allowed to be evidence for himſelf to prove the robbery; ſo where a ſervant is admitted to be evidence to prove the delivery of his maſter's goods to a carrier, though at the ſame time he ſwears to diſcharge himſelf; and this is from the neceſſity in ſuch caſes, becauſe probably there may be no other evidence to prove thoſe facts. Beſides, in this caſe, the indorſement being of the inteſtate's hand-writing ſhould rather be given in evidence, becauſe it is to prove money paid in diſcharge of what was owing by the defendant; and it would be very hard to require any other proof, becauſe none can be had of ſuch tranſactions but his own indorſement; and the allowing it to be given in evidence is not an admitting it to be a ſufficient proof for the jury to find for the plaintiff, but to let it have its due weight, that they may conſider upon the whole merits.

IT WAS INSISTED *for the defendant*, that this ſhould not be given in evidence, for if it ſhould, it will be in the power of any man who can get an old bond into his poſſeſſion, to charge the obligor again (after the money paid) by making ſuch an indorſement; and it would be as unreaſonable and as inconvenient to put the defendant to prove the money paid after ſo long a time of acquieſcence,

SEELE *againſt* BARRINGTON.

quieſcence, as it would be to put * the plaintiff to prove an actual payment of the intereſt thus indorſed.

A *new trial* cannot be granted after the plaintiff has been nonſuited and the nonſuit recorded.

FORTESCUE and RAYMOND, *Juſtices*, were of opinion, that this caſe ought to be judicially brought into court by *demurrer*, or by ſome other proper method; for the plaintiff being nonſuited, there is no cauſe now in court; and ſo whatever judgment is given it will be extrajudicial; and becauſe ſuch judgment will not determine the caſe, they at firſt were unwilling to give any judgment. —It is true, the indorſement made by the obligee charges himſelf, but if the obligor ſhould get the bond into his poſſeſſion, he may make as many indorſements as he will, and by that means wrong the obligee of all the intereſt; and THEY WERE OF OPINION, that this indorſement might be admitted in evidence; for it is the daily practice to make ſuch indorſements on bonds, and generally at the requeſt of the obligor; and this is the beſt and ſureſt evidence of the payment of the money, becauſe acquittances and notes may be loſt, whereas indorſements will continue as ſo many brands on the bond into whoſe hands ſoever it falls, as long as the original *lien* which creates the charge ſhall continue.

3. Wilſ. 146. 332. Cowp. 484. 3. Term Rep. 2.

PRATT, *Chief Juſtice*, ſaid, that at the trial he inclined to be of opinion that the indorſement ought not to be received as evidence; becauſe it would leave too great a power in an obligee, in whoſe cuſtody the bond always remains, to make ſuch indorſements whenever he thinks proper: they may be made at any time, and ſo no bond can ever be preſumed ſatisfied.

THE COURT ſeemed clearly of opinion, that the *nonproſs* could not be ſet aſide; yet adjudged to ſearch precedents *(a)*.

(a) LYTTLETON, FORTESCUE, and RAYMOND, *Juſtices*, were of opinion, that it ought to have been ſubmitted to the conſideration of the jury, S. C. 2. Stra. 827. but the Court were of opinion that the nonſuit being recorded, the plaintiff was out of court, and therefore a new trial could not be granted. But afterwards a new action was brought on the ſame bond, which was tried before RAYMOND, *Chief Juſtice*, who admitted the indorſement to be read in evidence, S. C. 2. Ld. Ray. 1371. and other evidence being given to induce the jury to believe the bond was not ſatisfied, there was a verdict for the plaintiff, S. C. 3. Brown C. P. 536. upon which a bill of exceptions was tendered and ſigned, and judgment given for the plaintiff, which judgment was afterwards affirmed by the Houſe of Lords on a writ of error, S. C. 3. Bro. Ca. P. 538. But it is a general rule, that after *twenty years*, and no intereſt paid during that time, a bond ſhall be preſumed to be ſatisfied, unleſs ſomething appears to anſwer that length of time, Humphreys *v.* Humphreys, 3. Peer Wms. 397. See alſo Oſwand *v.* Leigh, 1. Term Rep. 270.

Caſe 189. Manning *againſt* Turner.

Judgment againſt the bail ſet aſide upon the ſurrender of the principal.

IT WAS MOVED to ſet aſide a judgment againſt the bail, for that the principal ſurrendered himſelf the ſecond day of *May*; and ſeven days afterwards gave notice thereof to the attorney for the plaintiff, that he had ſurrendered himſelf on that day before *Juſtice* TRACY,

TRACY, and two days afterwards he gave notice that he had surrendered himſelf before *Juſtice* POWYS, and all this before the return of the ſecond *ſcire facias*. MANNING *againſt* TURNER.

IT WAS SAID *on the other ſide*, that though notice was given to the attorney, yet by the expreſs rule of this court, the bail are not diſcharged until the bail-piece is marked, which was not done until after the return of the ſecond *ſcire facias*. * It is true, there is an *exoneretur* entered now, but that was after the ſigning the judgment. * [281]

TO WHICH *it was replied*, that admitting the fact to be as before-mentioned, yet the judgment ought to be ſet aſide, becauſe the plaintiff's attorney took the bail-piece from the Judge's chamber, but did not leave it with the proper officer; but as ſoon as it was left with him, the attorney for the defendant entered an *exoneretur*, ſo that it was the plaintiff's fault that it was not entered ſooner. Tidd's Prac. 150.

This matter being referred to THE MASTER, he reported, that the principal ſurrendered himſelf on the ſecond day of *May*, and notice was given to the plaintiff's attorney, that the ſurrender was before *Juſtice* TRACY on the ſeventh day of *May*, and two days afterwards that it was before *Juſtice* POWYS, and the bail-piece was diſcharged on the fourth of the ſame month, and that the ſecond *ſcire facias* was returnable on the ninth day of *May*, and that the plaintiff's attorney took the bail-piece from the Judge's chamber, and kept it for a conſiderable time; and that there was not fifteen days between the *teſte* and return of the ſecond *ſcire facias*; neither was it four days in the office.

And upon this report the judgment was ſet aſide.

Wild *againſt* Harding. Caſe 190.

A RULE was made to diſcharge the bail, on a pretence that the principal had ſurrendered himſelf before the return of the ſecond *ſcire facias* againſt the bail.

Bail are not diſcharged upon the ſurrender of the principal, unleſs an *exoneretur* is entered on the bail-piece. Tidd's Prac. 150.

IT WAS MOVED to diſcharge that rule for two reaſons: firſt, For that if there was any ſuch ſurrender, the plaintiff's attorney had no notice of it; and ſecondly, If there had been notice, the defendant's attorney ſhould have brought the bail-piece before the Maſter to have it diſcharged, otherwiſe it is no ſurrender by the expreſs rule of this court; and neither of theſe things being done, the ſurrender is not regular, and therefore the bail are not diſcharged, there being no *exoneretur* entered on the bail-piece, not that the plaintiff owned the ſurrender was made in time.

THE COURT. It is the practice of the Court, that the bail are not diſcharged without entering an *exoneretur* on the bail-piece, on notice given of the ſurrender; but if the defendants did not give notice, it is an irregularity which will not be ſupplied by the

WILD *against* HARDING

Court without paying coſts; but if the bail ſurrendered the * principal fairly, though not ſtrictly regular, they ought to be favoured, and are indulged by the Court to ſurrender him at any time before the return of the ſecond *ſcire facias*; now the queſtion in this caſe is, Whether the principal did ſurrender himſelf before ſuch return? and the beſt evidence of that matter is the bail-piece; but if he did ſurrender himſelf, and gave notice, he ought to pay coſts until the bail-piece was marked; for he is to take notice of the *exoneretur*, and not of what the attorney for the plaintiff told him.

Caſe 191.

Goddard *againſt* Gilman.

Where a *fieri facias* without a *teſtatum* is not good.

THE PLAINTIFF brought an action of debt in *London*, and had judgment, and ſued out a *fieri facias* directed to the ſheriff, without a *teſtatum fieri facias* into *London*, by virtue whereof the defendant's goods were taken in execution in *Middleſex*; and becauſe this was done by an original *fieri facias* without a *teſtatum*, the execution was ſet aſide as irregular.

The plaintiff now moved, that, he having a judgment with a releaſe of errors, the goods might remain in the ſheriff's hands, and not be delivered to the defendant, who was a poor man, for by that means the plaintiff would loſe his debt.

THE COURT. When the execution is ſet aſide, as it was in this caſe, the goods taken muſt be returned, becauſe there can be no colour for the ſheriff to detain them (*a*).

(*a*) The like rule was made in Michaelmas Term following, in the caſe of White *v.* Cornwall, where an action was laid in one county, and the plaintiff had judgment, and took out a *fieri facias* directed to the ſheriff of another county, without a *teſtatum*, *&c.* afterwards, the plaintiff's attorney perceiving this miſtake, ſued out a *teſtatum fieri facias* into that county; but before it came to the ſheriff he had executed the firſt writ, and afterwards he executed the other writ; but the execution was ſet aſide, becauſe the firſt writ being executed, the ſheriff could not regularly execute the other.—NOTE *to the former edition.*—See alſo Brand *v.* Mears, 3. Term Rep. 388. Milſtead *v.* Coppard, 5. Term Rep. 272. and Copperthwait *v.* Owen, 3. Term Rep. 657.

* [283]

Caſe 192.

* Fry *againſt* Carne.

Words where actionable.

ACTION ON THE CASE for theſe ſcandalous words: "*Fry*" (the plaintiff) "had *the Pretender's* picture in his room, and "I ſaw him drink his health, and he ſaid that he" (the Pretender) "had a right to THE CROWN."

IT WAS MOVED *in arreſt of judgment*, that theſe words are not actionable.

But THE COURT would not ſuffer the defendant's Counſel to inſiſt on it, for that they all held that the words were actionable.

And ſo the plaintiff had his judgment.

The

The King *againſt* Sir Charles Holloway.

Caſe 193.

THE COURT was moved for leave to file an information againſt the defendant, who was about fifteen years old, and a ſcholar at *Winchester-School*, for aſſaulting, beating, and challenging, one *Eyres*, a clergyman, who was then ſecond maſter of that ſchool, for no other cauſe but that the laid ſchoolmaſter reproved the defendant for ſomething done at ſchool.

Information againſt a ſcholar for aſſaulting his maſter.

A rule was made for the defendant to ſhew cauſe.

Smith *againſt* Graham.

Caſe 194.

A RULE was granted upon a motion for a rule to ſhew cauſe why *an attachment* ſhould not iſſue againſt one *Clay*, a bailiff, for taking inſufficient bail, upon the arreſt of one (at the plaintiff's ſuit) on a *bill of Middleſex*.

Attachment againſt a bailiff for taking inſufficient bail

Martin *againſt* Budgell.

Caſe 195.

THIS was a motion for leave to file a bill to warrant the proceedings in this court after a writ of error brought in parliament, and the want of a bill aſſigned for error; and upon a *certiorari* directed to THE CHIEF JUSTICE, he certified to the houſe of lords, that there was no bill filed in *Hilary Term*.

If want of a bill filed be aſſigned for error, and the Chief Juſtice certify that no bill was filed in that Term, it ſhall not be filed in another Term.

S. C poſt 368.

IT WAS NOW MOVED to file a bill * as of another Term.

A rule was made to move the houſe of lords for another *certiorari*; and the houſe ordered, that the plaintiff ſhould have leave to bring another *certiorari* to certify a bill filed of another Term.

3. Peer. Wms. 314.

And now this Court was moved, that the plaintiff might have leave to file a bill as of that other Term, *viz.* as of *Michaelmas Term*, and to enter continuances to warrant the proceedings; the like having been done in the caſe of *Walmſley v. Cerey* (*a*), where, in the common pleas, THE MEMORANDUM was allowed to be mended, and ſet right by the bill, it being to affirm the judgment of this Court, which had been affirmed on a writ of error in the exchequer-chamber. Now in the principal caſe, a writ of error was brought in the houſe of lords, after a bill exhibited in chancery for relief, and that bill diſmiſſed on hearing the cauſe; for which reaſon this Court ought to do anything in their power to ſupport this judgment, eſpecially ſince the merits are entirely againſt the plaintiff in error, otherwiſe he would have been relieved in equity.

E contra. This motion is improper, becauſe the want of a bill filed in ſuch a Term was aſſigned for error in the houſe of lords,

(*a*) See poſt. 368.

and

MARTIN *against* BUDGELL.

and that want was certified as of that Term by THE CHIEF JUSTICE: therefore a bill of any other Term will not warrant this proceeding; for THE MEMORANDUM in this declaration refers to a bill of *Hilary Term*, which cannot be warranted by a bill of another Term, and by entering continuances; and though the judgments in the common pleas are supported by originals of former Terms by entering continuances, it does not follow that the like may be done in this court; for in the common pleas, THE MEMORANDUM in the declaration is always general, without referring to any certain Term, as thus, "*alias prout patet Termino* "*Paſchæ, &c.*;" but in this court it recites, that the bill was of ſuch a Term, *viz.* "MEMORANDUM, *quòd alias, ſcilicet, Termino* "*Sancti Michaelis* (the plaintiff) *protulit quandam billam ſuam.*" Now if there was no bill of that Term, and the plaintiff ſhould get judgment, it ought to be reverſed for that reaſon. Beſides, where the want of a bill is aſſigned for error, the Court may indulge the plaintiff ſo far as to give him leave to file one; but never after THE CHIEF JUSTICE has certified the want of a bill of that Term, and the record cloſed. This being a judgment upon a demurrer, the want of a bill is certainly aſſignable for error, and it
* [285] is a good cauſe * to reverſe a judgment; and this appears by the ſtatute made for the amendment of the law *(a)*; by which it is enacted, "that all the ſtatutes of *Jeofails* ſhall extend to judgments "by confeſſion, *nil dicit, &c.*;" and no ſuch judgment ſhall be reverſed, ſo as an original writ or bill is filed; which imports, that if no bill be filed the judgment ſhall be reverſed. Now if the plaintiff might have leave to file originals and bills at any time, it is in vain to aſſign the want of them for error; but it is plain this cannot be done at any time, becauſe THE FILAZERS will not make them out after two Terms without application to the chancery; and then it is allowed upon ſome equitable circumſtances, but not otherwiſe.

And THE COURT ſeemed to be of opinion, that this motion was improper after the want of a bill filed in that Term was certified by the Chief Juſtice *(b)*.

(*a*) 4. & 5. *Anne*, c. 16. (*b*) See poſt. 368.

Caſe 196. The King *againſt* The Pariſh of St. John the Baptiſt.

Saturday, 22 *June*, 1725.

If an apprentice ſerve *his maſter* by day in one pariſh, and lodge on nights with his *father* in another pariſh, he does not gain a ſettlement in the maſter's pariſh, although his lodging with his father is paid for by the maſter, in purſuance of a covenant in the indentures, but he gains a ſettlement under the indenture in the father's pariſh.—S. C. 2. Ld. Ray. 1371. S. C. 1. Stra. 594. S. C. Sett. & Rem. 120. S. C. Forteſ. 321. S. C. Foley, 220.

TWO JUSTICES, by an order, removed *Elizabeth* and *Anne Warren* from *St. John the Baptiſt*, within the borough of the *Devizes*, in the county of *Wilts*, to *Biſhops Cannings*.

Upon

THE KING *against* THE PARISH OF ST. JOHN-THE BAPTIST.

Upon an appeal to the quarter-ſeſſions, the order of the two juſtices was quaſhed, and the paupers were ſent back to *St. John the Baptiſt*, as the place of their laſt legal ſettlement; which orders being removed into the king's bench by *certiorari*, the order of ſeſſions ſtated the fact ſpecially thus: *Joſeph Warren*, junior, father of the ſaid *Elizabeth* and *Anne Warren* (who are removed by the order), was born in the chapelry of *St. James*, and afterwards, on or before the twenty-fifth of *March* 1712, *John Powell*, of the pariſh of *St. John's*, hoſier and ropemaker, hired the ſaid *Joſeph Warren* as a weekly ſervant, and paid him weekly. *Joſeph Warren* ſerved him two years and upwards in manner aforeſaid. By indenture dated on or about the twenty-fifth day of *March* 1712, and executed two years after the date thereof, he was bound an apprentice to the ſaid *John Powell*, in which ſaid indenture are contained two covenants in the words following, *viz.* "And the ſaid *Joſeph Warren* the father doth hereby, for "himſelf, his executors, and adminiſtrators, covenant and agree to "and with the ſaid *John Powell*, his executors and aſſigns, that he, "the ſaid *Joſeph Warren* the father, his executors and admini-"ſtrators, ſhall and will, at his and their own proper coſts and "charges, provide and allow unto and for his ſaid ſon ſufficient "and neceſſary meat, drink, waſhing, lodging, and apparel, and "all other things fit and convenient for an apprentice of the ſaid "trade, during the laſt five years of the ſaid term. And the ſaid "*John Powell* for his part, doth hereby, for himſelf, his executors, "and aſſigns, covenant, promiſe, and agree to and with the ſaid "*Joſeph Warren* the father, his executors and adminiſtrators, that "he, the ſaid *John Powell*, his executors and aſſigns, ſhall and will "well and truly pay, or cauſe to be paid, unto the ſaid *Joſeph* "*Warren* the father, his executors and adminiſtrators, the ſum of "two ſhillings and ſixpence of lawful money of *Great Britain* by "the week, weekly, during the third year of the ſaid term of ſeven "years, except ſuch time or times as he the ſaid *Joſeph Warren* "the apprentice ſhall by ſickneſs or any other accident be unable "to work at the ſaid trade; and three ſhillings of like money "aforeſaid by the week, weekly, during the fourth year of the ſaid "term; and three ſhillings and ſixpence of like money by the "week, weekly, during the fifth year of the ſaid term; and four "ſhillings of like money by the week, weekly, during the laſt two "years of the ſaid term of ſeven years (except ſuch time or times "of inability as aforeſaid)." In purſuance of the indenture, *Joſeph Warren* began to ſerve the ſaid *Powell* in his open ſhop in the ſaid pariſh of *St. John's*, but had his meat, drink, waſhing, and lodging, during all the time, with his father in *St. James's*, other than on market-days and *Saturdays*, when he received his meat and drink with his maſter in *St. John's*, but that he never lodged one night with his ſaid maſter, or elſewhere, in the pariſh of *St. John*, during the ſaid apprenticeſhip or ſervice aforeſaid. And further, it was ſworn on behalf of *St. James's*, that the ſaid monies payable to the ſaid father by virtue of the ſaid indenture were paid accordingly,

THE KING *againſt* THE PARISH OF ST. JOHN THE BAPTIST.

ingly, and were in lieu and conſideration for his maintenance and lodging as aforeſaid. The ſeſſions therefore quaſh the ſaid order, being of opinion, that the pauper gained a ſettlement in *St. John's* pariſh by the apprenticeſhip (*a*).

(*a*) The court of king's bench quaſhed the order of ſeſſions, they being of opinion, that binding and ſerving alone is not ſufficient, but that there muſt alſo be an *inhabitancy* to gain a ſettlement by apprenticeſhip, S. C. 1. Stra. 594. S. C. 2. Ld. Ray. 1371. the words of the ſtatute 3. *Will. & Mary*, c. 11. ſ. 8. being, "that if any perſon ſhall be bound an "apprentice by indenture, and *inhabit* in "any town or pariſh, ſuch binding and "*inhabitancy* ſhall be adjudged a good "ſettlement." S. C. Conſt's Bott P. L. 2 vol. 563. pl. 503.; Rex *v.* Radcliffe, 2. Strange, 60.; and therefore if an apprentice ſerve in one place, and reſide at another, he gains a ſettlement at the place where he reſides forty days, Rex *v.* St. Peter's, 2. Conſt. 565. And in the above caſe the Court held the parties ſettled in *St. James's*, S. C. Foley, 220. S. C. Sett. & Rem. 120. and the reſidence ſhall be taken to be where he ſleeps 2-nights, Rex *v.* Caſtleton, Burr. S. C. 569. Rex *v.* Chick, Burr. S. C. 782.; and therefore if an apprentice live with his maſter forty days in one pariſh, and then forty days in another pariſh, he is ſettled in that pariſh in which he ſleeps the laſt night, Rex *v.* Brightelmſtone, 5. Term Rep. 388.—See alſo Rex *v.* Lowes, Burr. S. C. 825. and Rex *v.* Hulland, Dougl. 656. Cald. 118.

Caſe 197. The King *againſt* Cracker.

The defendant was found guilty upon an information in nature of a *quo warranto*, for uſurping the office of mayor, and fined.

THIS was a motion for a rule on the under-ſheriff of *Cornwall*, to execute a *capias pro fine* impoſed on the defendant *Cracker*; and that he might make the return immediately, and attend with it in court, or otherwiſe ſhew cauſe why he has not executed it.

This *Cracker* was found guilty upon an information in nature of a *quo warranto*, for uſurping the office of mayor of *Tregony*, in *Cornwall*, for ſeveral years ſucceſſively.

* [286] And now a rule was made, that the ſheriff ſhould return this writ within ten days, or ſhew cauſe why *an attachment* ſhould not go againſt him.

But the ſheriff brought *Cracker* in on the day the writ was returnable, and he was committed to the king's bench priſon until the Court ſhould conſider what fine to ſet on him, which was ſuſpended until the Term following; and a rule was made, that he ſhould be carried down to *Tregony*, at the next election-day for a mayor, in order to proceed to an election, which was done; and upon a *mandamus* directed to him for that purpoſe, *viz.* to elect and ſwear a new mayor, he returned, that *T. S.* was duly elected mayor, and that he was willing to ſwear him into that office.

But he having miſbehaved himſelf in this election, there being no more than two who voted for the new mayor, who was unwilling to take the office upon himſelf, leſt he ſhould be proſecuted upon an information for uſurping the office, he refuſed to be ſworn; ſo this *Cracker* continued mayor ſtill, having been mayor, though he was ſix months in priſon.

And

And for this miſbehaviour he was found guilty, and fined two hundred pounds, and to ſtand committed until he paid it. THE KING *againſt* CRACKER.

The King *againſt* Pyke. Caſe 198.

A RULE was made for the defendant *Pyke*, and one *Prideux*, to ſhew cauſe by what authority they claimed to be capital burgeſſes of the corporation of, &c. and another rule for an information in nature of a *quo warranto* againſt this *Pyke* and one *Harriſon* (the two contending mayors), to ſhew cauſe by what authority they claim being mayors of the corporation, &c.

Information not granted where there has been a peaceable poſſeſſion of burgeſs-ſhip for fourteen years.

It was now moved to make both theſe rules abſolute.

It is true, the defendants have ſworn that they have been fourteen years in poſſeſſion of the capital burgeſs-ſhip, under a pretended election of them into that office; but ſince the election of a mayor very much depends on their being duly elected burgeſſes, it was inſiſted, that the Court would grant this information, as they did in the caſe of the corporation of *Penryn*, notwithſtanding a long acquieſcence.

See the ſtatute 32. *Geo.* 3. c. 58.

E contra. * The objection in this caſe is not like that in the caſe of the corporation of *Penryn*, becauſe here was fourteen years peaceable and uninterrupted poſſeſſion, therefore the rule was diſcharged as to them, and that no information ſhould be granted, but that the rule ſhould ſtand againſt *Pyke* and *Harriſon*, the contending mayors.

* [287]

And an information in nature of a *quo warranto* being granted againſt them,

It was ſaid, that upon the trial of that information, and if the Court ſhould deny to grant an information againſt the capital burgeſſes, they will contend that the proſecutor cannot give any diſability of theirs in evidence, and therefore would be good witneſſes againſt him.

See Rex v. Stacey, 1. Term Rep. 1. Eſpin. Dig. 698.

To which it was anſwered by THE COURT, that the right of a man ſhall not be tried in any collateral action to which he is not a party, therefore the diſability of *Prideux* cannot be given in evidence on the trial of this iſſue; ſo the rule againſt him as capital burgeſs was diſcharged.

The King *againſt* The Pariſhioners of Wilby. Caſe 199.

UPON A MOTION to quaſh an order of ſettlement made by two juſtices, and which was confirmed upon an appeal to the ſeſſions, the caſe appeared to be thus:

If a man build a cottage upon a waſte, without any Licence, and after thirty years enjoyment die poſſeſſed, his heir at law gains a ſettlement by reſiding forty days in ſuch cottage after his death.—S. C. Stra. 608. S. C. 2 Self. Caſ 121. Addr. 5. 29. Viner, 172.

One

THE KING *against* THE PARISHIONERS OF WILBY.

One *Humphrey Carr*, about thirty years laſt paſt, built a cottage in the pariſh of *B.* on the waſte of a manor belonging to the *Earl of Pembroke*, but without any licence or order ſo to do, and he enjoyed the ſame during his life, without any other right, and then died, leaving iſſue *Elizabeth*, his only daughter and heir, who intermarried with *John Darby*, who with his wife *Elizabeth*, being ſeiſed of this cottage, ſold it to *John Willy* for thirty pounds (*a*).

The queſtion was, Whether this matriage had gained a ſettlement of *John Darby* the huſband.

IT WAS INSISTED that it had not, becauſe the father of *Elizabeth*, the wife of this *Darby*, had no ſettlement there, for his entry was by *diſſeiſin*, which gains no ſettlement; and if the father had none, his daughter could not have any ſettlement there.

But THE COURT were of another opinion, becauſe thirty years poſſeſſion is a good title againſt the lord of a manor, by virtue of the ſtatute of Limitations, if he ſhould bring an ejectment to recover
* [288] the poſſeſſion (*b*). * Beſides, *Elizabeth*, the wife of this *Darby*, and daughter and heir of *Humphrey Carr*, was in poſſeſſion by *deſcent*, which is a good title againſt any eſcheat the lord might have at common law, and therefore her huſband gained a ſettlement by this marriage (*c*).

(*a*) See 9. *Geo.* 1. c. 7. ſ. 5.
(*b*) Stocker *v.* Berney, 1. Ld. Ray. 741.
(*c*) See Rex *v.* Garway, Burr. S. C. 632. Rex *v.* Betton, Burr. S. C. 631.; and Rex *v.* Brungwyn, 2. Bott's P. L. 637. pl. 567.

Caſe 200.

Croſſe *againſt* Talbot.

A perſon who is only *retained* as the ſervant of an ambaſſador is not protected from arreſt.

MOTION, on behalf of the defendant, to ſet aſide the bail-bond given upon his arreſt, and that common bail might be accepted for him; and he obtained a rule to ſhew cauſe.

His affidavit ſhewed, that he was retained as *valet de chambre* to *M. Hoffman*, the *Duke of Holſtein's* reſident here, at twelve pounds twelve ſhillings *per annum* wages, and ten ſhillings a-week board wages; and a certificate of this was produced, under the Reſident's own hand; but it did not appear that he either lay in the houſe, or actually executed the office.

THE COURT held, that he ought to be a *domeſtic ſervant*, and really to execute the duty of his office, and that being a mere nominal ſervant was not ſufficient (*a*).

And they diſcharged the rule.

A great many caſes have been ſince determined upon the ſame principle; but it was in thoſe caſes holden, that the idea of a

(*a*) Where a perſon does not execute the office for which he hath his certificate, but only gets himſelf entered upon the liſt to have the benefit of a protection, the Court will not endure it. Barnard. K. B. 79. See id. 401.—NOTE *to former edition.*

domeſtic

domeſtic ſervant was not confined to his lying in the foreign miniſter's houſe, provided he is a real ſervant to him, and actually performs the ſervice *(a)*.

CROSSE *againſt* TALBOT.

(*a*) See Grotius De Jure Belli et Pacis, bk. 2. c. 18. ſ. 8.; the ſtatute 7. *Anne*, c. 12.; and the caſes of Evans *v.* Higgs, 2. Stra. 797. Ld. Raym. 1524. Widmore *v.* Alvares, Fitzg. 200. Heathfield *v.* Chilton, 4. Burr. 2015. Poitiers *v.* Cresa, 1. Black. Rep. 48. Triquet *v.* Bath, 3. Burr. 1478. Malachi Carolina's Caſe, Wilſ. 78. Holmes *v.* Gordon, Caſes T. H. 2. Lockwood *v.* Coſgarne, 3. Burr. 1676. Tidd's Practice, 42. Hopkins *v.* De Roebuck, 3. Term Rep. 79.

Seviniack *againſt* Marſhall.

Caſe 201.

THIS was an action brought againſt an adminiſtratrix, who pleaded, that ſhe had not aſſets *die impetrationis brevis originalis*, when the action was brought *by bill*, and not *by original*; and for this cauſe the plaintiff demurred, and had judgment.

Plea by an adminiſtratrix, not good.

The King *againſt* Smart.

Caſe 202.

UPON A CERTIORARI to remove an indictment, the defendant entered into a recognizance to try it at the next aſſizes, which he could not do by reaſon of the indiſpoſition of ſome witneſſes.

And this appearing to the Court upon affidavit, it was moved to ſtay the eſtreating of *the recognizance*:

Which was granted upon payment of coſts, and entering into a rule to try it at the next aſſizes following, eſpecially ſince the proſecutor can get nothing by the eſtreat of the recognizance, but now he gets his coſts.

The eſtreating a recognizance was ſtayed, for that the defendant could not get his witneſſes, who were ſick.

See ſtat. 4. *Geo.* 3. c. 10. for the more eaſy diſcharge of recognizances eſtreated into the exchequer.

* Paterſon *againſt* Dyer.

Caſe 203.

A DECLARATION was delivered in *Michaelmas Term*, and rules given for pleading according to the courſe of the court; but the defendant making default, the plaintiff's attorney ſigned judgment, and gave due notice of executing a writ of inquiry.

The defendant appeared at the time and place, and made defence.

But ſome time afterwards he would impeach the judgment; but it was not allowed, becauſe he had made defence at the executing the writ of inquiry.

A judgment by default ſhall not be impeached where the defendant made defence upon the writ of inquiry.

Anonymous.

Caſe 204.

Anonymous.

Where the defendant ought to plead in chief.

THE DEFENDANT had leave to plead *de novo* within four days, within which time he ought to have pleaded *in chief*; but inſtead of that he pleaded an outlawry of the plaintiff in diſability, &c. and thereupon the plaintiff ſigned judgment for want of a plea *in chief* within the four days.

And this was held regular. But upon payment of coſts, and giving the plaintiff judgment in debt for his ſecurity, and bringing twenty pounds into court, and pleading to iſſue immediately, the judgment was ſet aſide.

Caſe 205.

The King *againſt* Purſell.

The Court will grant a *new trial* in *perjury*, if the defendant was convicted by ſurprize.

THE DEFENDANT being proſecuted for oppreſſing an honeſt man, under colour of a warrant of THE CHIEF JUSTICE, was ordered to anſwer upon *interrogatories*; and upon his examination he forſwore himſelf, and was indicted and convicted of perjury.

And now he moved to ſet aſide the conviction, it appearing upon *affidavit* he could not be ready to make any defence at the trial.

And upon this motion the verdict was ſet aſide upon payment of coſts, and entering into a rule to try it forthwith.

* [290]

Caſe 206.

Addiſon *againſt* Paterſon.

The bail cannot plead the miſnomer of the principal in abatement.

ONE *Charles Fountaine* was arreſted at the ſuit of the plaintiff, and the bail-piece was thus marked: "PETRUS FOUNTAINE "*traditur in ballium, &c. qui arreſtatus fuit per* nomen* CAROLI "FOUNTAINE;" and in the recognizance of bail it appeared, that they were bail for *Peter Fountaine*.

And now upon a *ſcire facias* brought againſt them, both the principal and bail plead this matter in abatement.

It was moved to ſet aſide this plea, becauſe the bail cannot plead this in abatement; beſides, the principal and his bail cannot join in one plea.

THE COURT was of opinion, that the bail could not plead this *miſnomer* in abatement, though the principal might.

So a rule was made for the defendant to anſwer over.

Springett

Springett *againſt* Chadwick. Caſe 207.

INDEBITATUS ASSUMPSIT for ſeveral things due to the plaintiff; to which declaration the defendant pleaded in bar, that he gave a note of twenty pounds to the plaintiff in full ſatisfaction of the debt, &c.

A *note* cannot be pleaded in bar to an *indebitatus aſſumpſit*.

And upon a demurrer to this plea the plaintiff had judgment, becauſe a note thus given is no diſcharge of a debt or a duty.

Dyer, 75. 6. Co. 44. Cro. Jac. 650. 1. Mod. 225. 261. 4. Mod. 43. Stra. 426. 2. Wilſ. 86.

Palmer *againſt* Byfeild. Caſe 208.

A RECOGNIZANCE was taken before a Judge of the court of king's bench, at his chambers in *Serjeants-Inn*, in *Fleet-Street*, *London*, and afterwards a *ſcire facias* was brought, directed "To the ſheriff of *Middleſex*," without mentioning that the recognizance was enrolled.

Recognizance taken in *London*, and *ſcire facias* on it to the ſheriff of *Middleſex*.

And now it was moved to quaſh the proceedings on this *ſcire facias*, becauſe it will not lie into *Middleſex* upon a recognizance taken at a Judge's chamber (*a*).

And THE COURT was of that opinion; but that if the recognizance had been enrolled, the *ſcire facias* would have been good, either into *London* or to *Middleſex*, at the election of the party; but if not enrolled, then it lies into *London* only.

(*a*) Allen, 9.

Clerk *againſt* Dier. Caſe 209.

IN AN ACTION ON THE CASE for theſe words ſpoken negatively, *viz.* "I never came home and poxed my wife;"

Words negatively ſpoken, not actionable. 1. Com. Dig. 261.

The plaintiff had a verdict.

But the judgment was arreſted by the opinion of THE WHOLE COURT, for that the words were too looſe to bear an action.

* Saladine *againſt* Sir Jacob Jacobſon. Caſe 210.

THE DEFENDANT was one of the directors of the *South-Sea Company*, and the plaintiff had obtained a judgment againſt him for a thouſand pounds. By the ſtatute 7. *Geo.* 1. c. 1. ſ. 5. it is enacted, "That every director, &c. ſhall deliver on oath, "before one of the barons of the exchequer, before 25th *March* "1721, two inventories of all the real and perſonal eſtate of which "he was poſſeſſed or entitled unto in his own right, or of any "other perſon in truſt for him, &c. which ſhall diſcharge him "from the demands of all other perſons; all which eſtates ſhall "be forfeited and recovered by virtue of that act, and ſhall be paid "into

Judgment againſt a director of the *South-Sea Company* ſet aſide.

SALADINE *againſt* SIR JACOB JACOBSON.

"into the exchequer, and applied for the benefit of the *South Sea* "*Company.*"

And now it was moved for the opinion of the Court, whether the defendant could avoid this judgment upon his own affidavit that he gave in a true inventory purſuant to the act.

THE COURT. All that is required in this caſe by the ſtatute is, to give an exact and true inventory, and he ſwears that he gave an inventory purſuant to the act, ſo need not name all the particulars; and it is abſolutely neceſſary that his evidence ſhould be taken, becauſe he beſt knows whether the inventory was true, or not. So the judgment againſt him was vacated.

Caſe 211. The King *againſt* Powell.

Whether an ancient cuſtom ſhall be good againſt a charter. S. C. ante, 165. 202.

UPON A MOTION for a trial at bar it was offered for cauſe, that a jury who had tried this very cauſe againſt one *Jones*, had found directly againſt the charter of this corporation, *viz.* that foreigners might be choſen to all the offices therein, by virtue of an old cuſtom antecedent to their charter.

S. C. 3. Bro. P. C. 428.

But the rule for a trial at bar was oppoſed, becauſe if it ſhould be granted, it would very much influence the next election of any perſon into any office in this corporation; beſides, this point might be brought before the Court by ſpecial pleading.

THE COURT. Or by a ſpecial verdict found at the aſſizes, and directed by the Judge; ſo there is no occaſion for a trial at bar, eſpecially ſince there is nothing in this caſe to be tried but a point * [292] * in law, *viz.* Whether an ancient cuſtom ſhall be good, and prevail againſt the expreſs words of a charter.

Caſe 212. Shelburne *againſt* Stapleton.

S. C. ante, 68. S. C. 1. Stra. 615. S. C. 3. Bro. P. C. 89. S. C. 6. Viner, 438. S. C. 20. Viner, 5. Ante, 40. 105. 5. Com. Dig. "Pleader" (C. 53.).

THIS was an action brought for a penalty contained in certain articles of agreement, wherein the plaintiff covenanted, that on payment of thirteen hundred pounds to him by the defendant, on or before the ſhutting the books for the *Chriſtmas* dividend, he (the plaintiff) would transfer upon tender or payment, &c. and the defendant covenanted to receive ſo much ſtock, &c. and to pay the money, &c. on or before the transfer-day, on the penalty of ſo much, &c. And it was further agreed, that upon any default in the defendant, it ſhould be lawful for the plaintiff to ſell the ſaid ſtock at the market-price, and to retain the ſaid ſum of thirteen hundred pounds; and if there was any ſurplus, he (the plaintiff) was to pay it over to the defendant; but if the ſaid ſtock ſhould be ſold at a lower rate than would ſatisfy that ſum, then the defendant was to make up the deficiency.

And now, upon an action of debt in the common pleas, the plaintiff declared and ſet forth this agreement, and that on ſuch a day,

day, before the ſhutting the books, he was at the *South-Sea Houſe* ready to transfer, and then and there tendered to transfer, and ſtayed there till the ſhutting the books; and *licet* he had performed all on his part, the defendant was not there, nor anybody for him, to accept the ſaid tender, or to pay the money; whereupon he ſold the ſtock for three hundred and thirty-two pounds, that being the market-price; and aſſigned for breach of this agreement, that the defendant had not paid the deficiency, ſo that he (the plaintiff) is entitled to recover the penalty mentioned in the ſaid articles. SHELDRAKE *againſt* STAPLETON.

The defendant pleaded in bar, that he made a feoffment of lands to the plaintiff in ſatisfaction of the principal ſum, after the penalty was forfeited.

Upon a demurrer to this plea, the defendant had judgment in the common pleas.

And now upon a writ of error brought in the king's bench,

IT WAS INSISTED *for the defendant in error*, that this judgment was given for errors in the declaration; for the plaintiff in the original action had not laid a ſufficient breach of this agreement, which was, to transfer the ſtock on or before the ſhutting of the books, &c. and that the defendant *ſuperinde* was to pay the money: now the plaintiff had ſet forth, that the books were open to the twenty-third of *December*, and * that he on that day and hour, before the ſhutting the books at the *South-Sea Houſe*, tendered to transfer the ſtock, but did not aver that to be the uſual place of tender; ſo that if no certain and uſual place is aſſigned for a tender, it muſt be made to the perſon himſelf, unleſs the nature of the thing did aſcertain the place. * [293]

Now if a tender is not neceſſary, then another queſtion will ariſe, (*viz.*) Whether thoſe are mutual covenants, or not? for if they are, then it muſt be admitted that each of the parties may maintain an action, without alledging the performance on his part; for if one covenants to do ſuch a thing, and the other covenants to do another thing, each of them may have his mutual action. But that is not this caſe; for here the ſecond thing to be done ſo entirely depends on the firſt, that there is ſome precedent act to be done to intitle the plaintiff to ſuch ſecond thing; and in ſuch caſe he muſt ſhew that he had done all things by him to be done, before he can bring his action for not doing the other thing; and ſo is the caſe of *Thorp v. Thorp* (*a*), which was an action on the caſe on a ſpecial agreement, by which the plaintiff agreed to releaſe the equity of redemption of a mortgage, and "all ſums of "money and demands whatſoever;" and in conſideration thereof the defendant agreed to pay ſeven pounds, &c. and mutual promiſes were laid; and the plaintiff averred performance on his part, and that the defendant had not paid the money; the defendant pleaded in bar, that after the promiſe the plaintiff had releaſed "all

(*a*) Lutw. 245.—See Vent. 147. 177. 224. Saund. 319.

SHELBURNE *againſt* STAPLETON.

" demands ;" the plaintiff craved *oyer* of the releaſe, which was of the equity of redemption, and of " all actions and demands," and then demurred to the plea ; and it was inſiſted to maintain the plea, that the plaintiff having laid mutual promiſes in this declaration, might bring an action for the money before this releaſe was executed, and if ſo, then the releaſe is a good bar to the action, which is very true in ſome caſes where mutual promiſes are laid, but not in this, becauſe the releaſe was part of the agreement, *viz.* " it was agreed that the plaintiff ſhould execute a releaſe, " &c. ;" and it was upon that conſideration that the defendant agreed to pay the ſeven pounds ; therefore the releaſe was to precede, and until that was executed the plaintiff had no cauſe of action ; therefore it would be abſurd to ſay, that the releaſe ſhall diſcharge that very duty which it created. So in the principal caſe, the plaintiff covenanted, that he would transfer the ſtock, on payment of ſo much money on or before the ſhutting the books, &c. and the defendant * covenanted to receive the transfer, and to pay, or cauſe to be paid, *adtunc proinde* ; ſo that he is not to pay the money until an actual transfer, or a lawful tender to transfer ; therefore the tender is in nature of a condition precedent, and is abſolutely neceſſary in this caſe ; and if that be not well laid in the declaration, the plaintiff can have no cauſe of action. It is true, where the covenants are mutual an action will lie for either of the parties, without averring performance on his part, though one is the conſideration of the other, and though *pro* or *in conſideratione*, *&c.* is in the declaration ; but that is not this caſe, for here the defendant agreed to accept the transfer of the ſtock, and *adtunc proinde* to pay the money ; ſo that the plaintiff cannot maintain an action, unleſs the ſtock was transferred, or the tender to transfer was well laid in the declaration. Beſides, he ſhould have laid a ſpecial performance on his part, and not by ſuch a general allegation as *licet* he had performed ; all which was to be done on his part ; for the action will not lie without alledging a ſpecial performance.

* [294]

Cro. Car. 384. Vent. 114. 126.

TO WHICH *it was anſwered*, that though the averment of performance was general, yet the pleading over of a collateral matter had made that general allegation good, it being bad only in form. Beſides, here is a certain time appointed for the performance of this agreement on the defendant's part, *viz.* on payment of thirteen hundred pounds, &c. on or before the ſhutting of the books for the *Chriſtmas* dividend, and the defendant agreed to accept ſo much ſtock, and to pay the money ; now if either of the breaches are well laid, *viz.* the non-acceptance of the transfer, or the non-payment of the money, the plaintiff is entitled to this action. But it being farther agreed, that upon any default in the defendant it ſhould be lawful for the plaintiff to ſell the ſtock, and if the money ariſing by ſuch ſale would not ſatisfy the ſaid thirteen hundred pounds, then the defendant would make up the deficiency ; if all the reſt was out of the caſe, the plaintiff is entitled to ſell the ſtock,

ſtock, and to maintain this action againſt the defendant in not paying the deficiency, according to his covenant.

SHERBURNE *againſt* STAPLETON.

THE COURT. The caſe was thus: An action of debt was brought for a penalty mentioned in articles of agreement, &c. in which the plaintiff declared, that by indenture, &c. *teſtatum fuit* that he ſold *South-Sea* ſtock to the defendant, and covenanted to transfer the ſame before the ſhutting the books for * the *Chriſtmas* dividend; and that the defendant covenanted to receive and pay for the ſaid ſtock before that time; but if he did not, then the plaintiff might ſell it; and if the money ariſing by ſuch ſale would not make up thirteen hundred pounds, then the defendant agreed to ſupply the deficiency, for which the action was now brought. It was objected, that by this agreement the plaintiff was to transfer the ſtock, which the defendant agreed to receive; ſo that unleſs the ſtock were actually transferred, or a lawful tender made to transfer it, the defendant was not bound to pay the money; and it was argued, that this was not a lawful tender, becauſe the plaintiff ſet forth that it was made at the *South-Sea Houſe*, and did not aver, that that was the uſual place to make ſuch tender; but yet the plaintiff is entitled to this action, becauſe theſe are mutual covenants, and either party may maintain an action for non-performance. It has been likewiſe objected, that the money was not to be paid until a transfer was made of the ſtock, and an acceptance of that transfer; but this is a wrong conſtruction of the covenant, for he was to pay the money before the ſhutting the books for the *Chriſtmas* dividend, and not on the acceptance of the transfer; for otherwiſe it would be in his power to pay, or not to pay, which would be inconſiſtent with his covenant; therefore, in conſtruction of this covenant, the intention of the party is to be a guide, and ſo far to govern as not to make the agreement repugnant in itſelf; and here the intention was plain, that on non-payment of the money the plaintiff might have this action. Beſides, the time of entering into this covenant is to be conſidered, and that was when the ſtock became an uncertain eſtate, as it was then; therefore the party agreed to have the money payable firſt.

* [295]

The judgment of the common pleas was reverſed; and the judgment of the king's bench was reverſed in the houſe of lords.

Williams *againſt* Green. Caſe 213.

Debt lies againſt bail jointly, or each ſeverally.

JUDGMENT AGAINST THE PRINCIPAL, and a *ſcire facias* was brought againſt *the bail*, and upon two *nihils* returned there was judgment againſt the bail; and afterwards an action of debt was brought againſt one of the bail for all the money due to the plaintiff.

IT WAS OBJECTED, that this action would not lie againſt one of the bail, becauſe the judgment againſt them is joint.

WILLIAMS *againſt* GREEN.

* IT WAS SAID *on the other ſide*, that the action was brought upon the recognizance of bail, which is joint and ſeveral, and conſequently good, either joint or ſeparate; and ſo is the caſe of *Corniſh v. Clerke (a)*, in *Michaelmas Term*, in the tenth year of *George the Firſt*.

And ſo was the opinion of THE COURT in this caſe (*b*).

(*a*) Ante, 199. (*b*) See 1. Lev. 225.

Caſe 214.

Herbert *againſt* Morgan.

Motion in arreſt of judgment for exceſſive damages denied.

THE PLAINTIFF was arreſted at the ſuit of the now defendant in a fictitious action, without any colour of reaſon; and afterwards he brought an action of falſe impriſonment againſt the defendant, and the jury gave him eighty pounds damages.

And upon a motion in arreſt of judgment, becauſe the damages were exceſſive, it was oppoſed by the plaintiff's Counſel, and inſiſted, that he might have the benefit of the verdict.

Which was granted, and accordingly the plaintiff had judgment.

Caſe 215.

The King *againſt* Reeves.

Indictment quaſhed.

UPON A MOTION to quaſh an indictment, for that it was "*præſentatum exiſtit quæ billa eſt vera*," inſtead of "*quod* "*billa eſt vera*," a rule was made to quaſh it *niſi cauſa*, but no cauſe was ſhewn; and ſo the indictment was quaſhed for that fault.

TRINITY

TRINITY TERM,

The Tenth of George the First,

IN

The Court of Exchequer.

Sir Jeffery Gilbert, *Knt. Chief Baron.*

Sir Francis Page, *Knt.*
Sir William Baniſter, *Knt.* } *Barons.*
Sir Bernard Hale, *Knt.*

Sir Philip Yorke, *Knt. Attorney General.*
Sir Clement Wearg, *Knt. Solicitor General.*

Morgan's Caſe.

Caſe 216.

Cuſtom, where it is well pleaded; where amerciaments are to be aſſeered, where not.

S. C. Gilb. Eq. Rep. 209.

IN TRESPASS for taking his cattle, &c. the defendant juſtified as ſervant to one *Morgan*, ſetting forth, that *Morgan* was ſeiſed of the manor of *D.* in fee, to which A COURT-LEET did belong, &c. and that time out of mind there had been a cuſtom, that *quilibet tenens* of a freehold tenement, and who was a reſident and an inhabitant within that manor, ought, upon notice or ſummons, to appear perſonally at the ſaid court-leet three times in every year, *viz.* at the Feaſts of *St. Michael* and *St. Hilary*, and at *Eaſter*; and for default of appearance at the ſaid courts, to pay to the ſteward of the ſaid leet, to the uſe of the lord, ſeven ſhillings for every default; and that if he did not appear at two of the ſaid courts, but did appear at the third, then to pay an *eſſoin-penny* only; and farther, that if any ſuch tenant, being ſummoned * to be of the grand jury, ſhould not appear, that then he ſhould be amerced ſeven ſhillings by the ſteward, and that the bailiff of the manor, by warrant from the ſteward, might diſtrain for ſuch amerciaments, and ſell the diſtreſs, &c. Then he ſets forth, that the plaintiff was ſummoned to appear at two ſeveral courts, and made default; and that he was likewiſe ſummoned to be of the grand jury, &c. but did not appear at that court; for which defaults he was amerced twenty-

* [297

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twenty-eight ſhillings; and becauſe it was not paid, *Richard Hughes*, ſteward of the ſaid leet, made his warrant, directed to the defendant, to levy the ſame by diſtreſs and ſale of the plaintiff's goods, *virtute cujus* he diſtrained the cattle, &c. and ſold them, and paid twenty-eight ſhillings to the ſteward, for the uſe of the lord of the ſaid manor, *quæ eſt eadem tranſgreſſio, &c.*

And upon a demurrer to this plea, ſeveral exceptions were taken to it.

FIRST, That the cuſtom was void, becauſe it was laid too general.

SECONDLY, That it was void, becauſe it is for the ſteward to amerce without any *affeerment.*

THIRDLY, That here was a double amerciament for one and the ſame default at one court, *viz.* in not being of the homage, and not appearing at that court.

As to THE FIRST EXCEPTION, this cuſtom is void, becauſe it is laid too general, *viz.* that *quilibet tenens, &c.* uſed and ought to appear, without exception of the quality, degree, or ſex of perſons, whereas ſeveral are exempted from appearing and attending at the leet, both by the common law and ſtatutes of this realm; as infants under the age of twelve years, and this is by the common law (*a*); and eccleſiaſtical perſons are exempted by the *ſtatute of Marlbridge* (*b*), VIZ. archbiſhops, biſhops, &c. are not to appear at the ſheriff's torns, and conſequently not at leets, which were derived out of the torns; and if they ſhould be diſtrained for any amerciament, &c. for not appearing in the leet, they have a writ upon the ſtatute by way of privilege (*c*); for as they are not obliged by law to appear at leets, ſo they are not amerciable for not appearing; therefore this cuſtom being general, and not ſetting forth theſe exemptions, is void, and cannot ſubſiſt againſt the *ſtatute of Marlbridge*, which is introductory of a new law, and deſtroys all cuſtoms and preſcriptions againſt it (*d*).

* [298] * SECONDLY, This cuſtom is void, becauſe it is laid for the ſteward to amerce without an *affeerment*; and this is directly againſt MAGNA CHARTA (*e*), by which it is enacted, "that "amerciaments ſhall be aſſeſſed by lawful men of the vicinage," *i. e.* ſhall be affeered by thoſe lawful men appointed in courts-leet, upon oath, to ſettle and moderate the amerciaments of ſuch who have committed faults arbitrarily puniſhable, and have no expreſs penalty expreſſed by any law or ſtatute; ſo that to affeer is properly to tax, or to reduce a thing to a certainty by perſons on their oaths, and ought to be *per pares*; but this is a certain amerciament impoſed by the ſteward, without any affeerment, and is therefore void.

(*a*) Co. Lit. 172.
(*b*) 52. *Hen.* 3. c. 10.
(*c*) Fitz. N. B. 165. 2. Inſt. 120. Regiſter, 175.
(*d*) Co. Lit. 15. a. 2. Roll. Abr. 268. W. Jones, 270. 290.
(*e*) Cap. 14.

THIRDLY,

THIRDLY, This is a double amerciament for one and the ſame default at the laſt court; for the plea ſets forth, that the plaintiff being ſummoned to be of the grand jury did not appear, for which he was amerced ſeven ſhillings, and he was amerced ſeven ſhillings more for not appearing at that court, which is double, and exceeds the cuſtom. MORGAN'S CASE.

TO WHICH *it was anſwered*, as to THE FIRST EXCEPTION, thus: The cuſtom is good and well pleaded, though the exemptions are not ſet forth in the plea, for that the defendant is not obliged by law ſo to do; but the perſon diſtrained is to ſhew, that he is exempted from ſuch diſtreſs, if he be really intitled to any ſuch exemption, for the cuſtom is *lex loci*; and if there was any exemption, by virtue of the cuſtom, the plaintiff ought to have ſhewn it. Now to inſtance a parallel caſe: Upon diſbanding the army, an act of parliament was made, giving privilege to the ſoldiers to exerciſe their trades anywhere in *England* (*a*); now, ſuppoſing that there is a cuſtom in the borough of *H.* that no perſon ſhall exerciſe a trade therein unleſs he is free of that borough, and an action ſhould be brought againſt a ſoldier upon a bye-law founded on this cuſtom, certainly the cuſtom may be laid in general, and the exemption muſt come on the ſoldier's ſide; for it is not required, either by the ſtatute or common law, that exemptions ſhould be ſet out in pleading of cuſtoms; but the party who is to have the benefit of an exemption muſt ſet it forth, and ſhew, that he is not within the cuſtom by reaſon of the exemption. So where a cuſtom was alledged to diſtrain anything within ſuch an honour, it was objected to be too general (*b*), becauſe ſeveral things are not diſtrainable, but are privileged and exempted from diſtreſſes, VIZ. *averia carucæ*, and goods taken in execution by the ſheriff, and workmen's * tools, &c. (*c*); and the Book tells, it is not neceſſary to ſet forth ſuch exemptions, becauſe it is immaterial, and would make the pleadings too long; therefore the perſon exempted muſt ſhew it, and that he is not within the cuſtom by reaſon of his exemption. * [299]

AS TO THE SECOND POINT it was argued, that this cuſtom is good to amerce without an affeerment; for though it has been objected that it is contrary to MAGNA CHARTA, and that the general rule of pleading in ſuch caſes is to ſet forth an *amerciament*, and that it was affeered; yet notwithſtanding MAGNA CHARTA, and that rule of pleading, there may be an amerciament by cuſtom to a certain ſum, for this ſtatute was made in affirmance of the common law; and therefore though it is in the negative, *viz.* that no freeman ſhall be amerced, yet there may be a preſcription or cuſtom againſt it. This was the *Lord Coke*'s opinion in his *Firſt Inſtitutes* (*d*), *viz.* where a ſtatute in the negative is in affirmance of the common law, a man may preſcribe againſt it: 4 Com. Dig. "Leet" (O. 2.). Andr. 47.

(*a*) See 22. *Geo.* 2. c. 44. 3. *Geo.* 3. c. 8. and the 24. *Geo.* 3. ſeſſ. 2. c. 6.
(*b*) 1. Sid. 17.
(*c*) Co. Lit. 47. 4. Term Rep. 565. 568 Gilb. Diſ. 37.
(*d*) Co. Lit. 115. a.

MORGAN'S CASE.

as for inſtance; by the ſtatute of MAGNA CHARTA it is provided (*a*), that leets ſhall be holden twice a year only, *viz.* after *Eaſter* and *Michaelmas*; yet a man may preſcribe to hold them oftener, and at other times, becauſe that ſtatute is but an affirmance of the common law (*b*). Beſides, peers of the realm are within this ſtatute as well as commoners, and the amerciament of peers is not uſed at this day, becauſe it is reduced to a certainty by cuſtom, *viz.* a duke to ten pounds, and others to five pounds, and ſuch cuſtom is good. By the ſame reaſon an amerciament may be reduced to a certainty by cuſtom; and if ſuch cuſtom be good, then there cannot be any occaſion to affeer an amerciament, becauſe to affeer is only a taxation reducing that to a certainty which was uncertain before; but it is abſurd to ſay that a thing ſhall be reduced to a certainty which was certain in itſelf before the affeerment; ſo that the reaſon of affeering fails in this caſe, if the ſum be reaſonable; but if it be unreaſonable, then the cuſtom is void, and cannot ſtand. It appears by the old books (*c*), that cuſtoms to have particular ſums are good; as a cuſtom that the lord of a manor ſhall have three pounds for every pound-breach; this is good againſt the tenants, though not againſt ſtrangers; ſo in the principal caſe the ſum is reduced to a certainty, and the cuſtom charges the tenants but not ſtrangers: a man may preſcribe to have a certain ſum of money from any perſon * found guilty of an affray in a leet, and ſuch preſcription is good. This puniſhment is here called "an amerciament," but it is not properly ſo, but a fine impoſed by the Court, whereas amerciaments are always by the jury: now MAGNA CHARTA mentioning amerciaments, for that reaſon they are to be affeered, for the judgment in an amerciament is general, VIZ. *quòd ſit in miſericordiâ*, and afterwards upon eſtreats directed to the coroner they are affeered; but a fine is not to be affeered, becauſe not mentioned in that ſtatute, which is the foundation of all affeerments; and there are authorities in point (*d*), that an amerciament impoſed by a ſteward of a leet, which is in nature of a cuſtomary fine, need not be affeered, though the cuſtom had not aſcertained the ſum; therefore there can be no need of an affeerment where the ſum is made certain by the cuſtom.

8. Rep. Greifly's Caſe.

*[300]

AS TO THE THIRD EXCEPTION, that the plaintiff is doubly amerced for one and the ſame fault, it is not ſo; and this appears by ſetting forth the cuſtom, *viz.* that every tenant who ſhall not appear, &c. being ſummoned to be of the homage, ſhall pay ſeven ſhillings, and if he do not appear at two of the ſaid courts, and appear at the third, he ſhall pay an *eſſoin-penny*; but if he do not appear at the third, and pay the *eſſoin-penny*, he ſhall then pay ſeven ſhillings for each of thoſe defaults. But the cuſtom is not laid to amerce for non-payment of the *eſſoin-penny*, for that was not

(*a*) Cap. 35.
(*b*) Plowd. 465.
(*c*) Year Books 11. *Hen.* 7. pl. 14. 21. *Hen.* 7. pl. 40.
(*d*) Year Book 10. *Hen.* 6. pl. 7. Bro. "Amerciament," 50.

to

to be paid but where the party neglected to appear at two courts, and appeared at the third; but here was a total neglect, for the defendant did not appear when he was ſummoned to be of the homage, nor at two other courts, nor at the third court. The cuſtom being, that if he did not appear at that court, and pay the *eſſoin-penny*, then for every default he ſhould pay ſeven ſhillings, muſt be underſtood for every default in not appearing, &c. and not for non-payment of the *eſſoin-penny*; ſo that this is not a double amerciament for the ſame default, but ſeveral amerciaments for ſeveral defaults in not appearing, &c. MORGAN'S CASE.

THE COURT. It is agreed, that this cuſtom would have been well laid if the exemptions had been ſet forth, and not ſo general that *quilibet tenens* ſhould appear, &c.; but it is certain, that ſuch exemptions which are by the common law, as of infants under twelve years, and women, &c. were never yet ſet forth in pleading of cuſtoms.

But it has been objected, that by the ſtatute of *Marlbridge* clergymen are exempted, and that this cuſtom cannot * prevail againſt that ſtatute; which is very true; but this does not alter the method of laying a preſcription or cuſtom in pleading, which, ever ſince the ſtatute was made, have been laid without mentioning any exemptions, but generally as in this caſe. It is true, if any perſons had been exempted by the cuſtom itſelf, ſuch exemption muſt have been ſet forth in pleading, becauſe the cuſtom is entire; but it is not neceſſary to ſet forth any other exemptions; therefore this cuſtom is well laid. The *ſtatute of Marlbridge* never intended by thoſe exemptions of eccleſiaſtical perſons to deſtroy *leges loci*; but thoſe laws ſtill remain as they did before, and perſons who will have any advantage of them muſt plead them; for it is the nature of exemptions to be exceptions out of the general rule; and it would be not only informal, but unreaſonable, to ſet them all forth in pleading. * [301]

So as to the firſt point, THE COURT WERE ALL OF OPINION, that the cuſtom was well pleaded.

As to the ſecond point IT WAS AGREED, that amerciaments are to be affeered, unleſs they are in nature of a fine, and that there is no occaſion for an affeerment, but where the amerciament is diſcretionary, which is not this caſe; for here the ſum is aſcertained by cuſtom, and the ſteward cannot increaſe or diminiſh it; and therefore this amerciament ought not to be affeered: firſt, Becauſe it is in the nature of a fine for a contempt; ſecondly, Becauſe the cuſtom has aſcertained it, and it is not diſcretionary; and of this opinion were THE CHIEF BARON and two more.

But THE OTHER BARON differed, for he was of opinion, that if the cuſtom be abrogated by MAGNA CHARTA, then this amerciament muſt be affeered, and that the cuſtom was abrogated by that ſtatute, by which it is enacted, "that all amerciaments ſhall be af-"feered *per pares*." It is true, fines are not within this ſtatute, but amerciaments are, and a fine is a ranſom from impriſonment; and wherever

MORGAN'S CASE.

wherever a leet may impriſon, it may aſſeſs a fine, as a price to redeem the party from an impriſonment, and a commitment always follows a fine; and therefore a *capiatur* lies for fineable offences; but in amerciaments, where the judgment is that the party ſhall be *in miſericordiâ*, as it is in this caſe, there they are to be aſſeered. It is true, the amerciament of peers is made to a certain ſum, but it is by order of the houſe of lords; and this was to prevent the
*[302] frequent application to the houſe when a * peer was to be amerced; but the principal caſe being only a nonfeaſance, and no breach of the peace, or contempt of the court, the ſteward cannot ſet a fine for it; and if ſo, then it falls back to an amerciament, and muſt be aſſeered *per judicium parium*.

As to THE THIRD POINT, that here is a double amerciament for one default, THE CHIEF BARON was of another opinion, for amerciament was in two inſtances, *viz.* for a default in not being of THE GRAND JURY, and for a default in not appearing at that court; and where a man is bound to appear in two reſpects, and doth not appear, thoſe are ſeveral defaults.

And ANOTHER BARON was of the ſame opinion, *viz.* that it is not a double amerciament for the ſame default; for if an officer who ought to attend the court by virtue of his office, and likewiſe as a grand-juryman, ſhould make default, he is to be fined in both reſpects; and in one there is no conſideration to be had of the other; therefore, notwithſtanding this objection, the plea is good.

But TWO OF THE BARONS were of opinion, that this cuſtom was void for the reaſons following, *viz.* every cuſtom muſt have a reaſonable commencement, which this cuſtom had not; for it being in time immemorial, ſeven ſhillings is too great a ſum to pay for ſuch a default; beſides, it is unreaſonable, becauſe it involves every perſon in it, when ſome perſons may have a reaſonable excuſe to be abſent; as for inſtance, a ſheriff may be called to attend on the king's perſon, &c.

Adjournatur (a).

(a) The Court took time to conſider of this caſe; and in Hilary Term, 12. *Geo.* 1. GILBERT, *Chief Baron*, delivered the opinion of himſelf and the other Barons, that this cuſtom was not good, for the reaſons aſſigned. S. C. Gilb. E. R. 211.

TRINITY

TRINITY TERM,

The Tenth of George the Firſt,

IN

The King's Bench.

Sir John Pratt, *Knt. Chief Juſtice.*

Sir Lyttleton Powis, *Knt.*
Sir John Forteſcue Aland, *Knt.* } *Juſtices.*
Sir Robert Raymond, *Knt.*

Sir Philip Yorke, *Knt. Attorney General.*
Sir Clement Wearg, *Knt. Solicitor General.*

Stamper *againſt* Hodſon.

Caſe 217.

THE PLAINTIFF having obtained judgment in debt againſt the defendant, ſued out a *fieri facias*, and likewiſe a *capias ad ſatisfaciendum* at the ſame time; and thereupon the defendant was taken in execution.

If a *fi. fa.* and a *ca. ſa.* be taken out, the *fi. fa.* cannot be executed after the party is taken on the *ca. ſa.*

It was now moved to quaſh the *fieri facias.*

THE COURT was of opinion, that the plaintiff might, for his own ſecurity, take out two writs, but he can execute but one; therefore this writ of *fieri facias* was quaſhed.

1. Vezey, 195.

* Page *againſt* Barns.

Caſe 218.

BY THE STATUTE 4. & 5. *Anne*, c. 16. for the amendment of the law, it is enacted, "that actions of account may be brought "againſt a bailiff or receiver, for receiving more than his juſt "ſhare."

Where wager of law will lie.

An action of account was brought upon this ſtatute againſt the defendant, as bailiff *ad merchandizandum*, who *waged his law.*

Upon demurrer it was objected, that *wager of law* would not lie in account againſt a bailiff *ad merchandizandum*; but if ſuch action

PAGE *againſt* BARNS.

action had been brought againſt a receiver, and the plaintiff did not ſhew by whoſe hands, there *wager of law* would lie.

And ſo IT WAS ADJUDGED in this caſe for the plaintiff.

Caſe 219.

Gravenor *againſt* Salter.

Objections in ejectment after verdict over-ruled.

Ld. Ray. 771. 2. Com. Dig. "Amendment" (L. 2.).

ERROR TO REVERSE A JUDGMENT in ejectment after a verdict.

SIMONS excepted to the declaration; for that the writ recited therein had miſtaken *the plaintiff* for *the defendant*, and ſo charged a demiſe of the lands to the defendant, inſtead of charging it to the plaintiff; and the declaration purſues the writ by referring thereunto, as *demiſit tenementa prædicta*; or elſe it is void for uncertainty.

SECONDLY, The *venire facias*, as contained in the *poſtea*, is ill, for the words are only *ad veritatem infra content. electi, triati, et jurati, dicere ſuper ſacramentum ſuum quod, &c.* omitting *dicend.*

But THE COURT over-ruled theſe objections, and affirmed the judgment.

Caſe 220.

Salter *againſt* Groſvenor.

If an aggregate corporation conſiſt of two bailiffs and burgeſſes, &c. the two bailiffs make but one office; and if a leaſe be made by one of them, in his political capacity, to the other, it is void.

IN EJECTMENT, &c. the caſe was thus: A corporation aggregate conſiſted of two bailiffs and burgeſſes, &c. and one of the bailiffs and the burgeſſes made a leaſe, in their political capacity, to the other bailiff in his natural capacity.

The queſtion was, Whether this leaſe was good, or not?

IT WAS ARGUED, that it was void, becauſe the bailiffs are an integral part of the corporation, and they both make but one officer (*a*); and therefore where one is ſevered in any corporate act, it makes that act void; for if one bailiff could do a corporate act ſeparately, this inconvenience would naturally enſue, *viz.* they might act directly contrary to each other; and therefore the meaning and intent of the charter in making two bailiffs was, that they ſhould be both preſent, and concur in every corporate act. And for this purpoſe the caſe of *Wood v. The Mayor of London* (*a*) was cited, where debt was brought in the court of the mayor and aldermen of *London*, for a penalty upon a bye-law made by the common-council; and it was for four hundred pounds penalty, of which three hundred pounds was to be to the uſe of the mayor and commonalty; and it was held, that this ſuit in the mayor's court

(*a*) 11. Co. 2. 1. Show. 289. 2. Mod. 23. 3. Lev. 399. Carth. 145. Cro. Eliz. 625.; and ſee Smith v. Powdick, Cowp. 197.

(*b*) 1. Salk. 397. pl. 3.

was

was proper, if he could be ſevered, and the court could be held before the aldermen; but he being an integral part, ſo as no court could be held without him, it could not be ſued for in his court, for then the ſame perſon would be both plaintiff and judge.

* THE COURT was of opinion, that a ſole corporation, as a biſhop or a parſon, could not make a leaſe to himſelf, becauſe he cannot be both leſſor and leſſee (*a*); and the law is the ſame in a corporation aggregate, as dean and chapter, for a leaſe cannot be made by *the chapter* without the concurrence of *the dean*; and for the ſame reaſon, a leaſe cannot be made to *the dean* without the concurrence of *the chapter*, but it may be made to any of *the prebendaries*, becauſe it is not neceſſary that any of them ſhould join in the leaſe, for *a prebendary* is not an integral part of the body corporate. But in the principal caſe the bailiffs make but one officer, and the one cannot act without the other; therefore if a leaſe be made by the corporation to one of them, he is both leſſor and leſſee, which cannot be. If proceſs ſhould be directed to the ſheriffs of *London*, and one dies, the proceſs is gone, becauſe one ſheriff cannot act without the other, for they both make but one ſheriff. * [304]

And for theſe reaſons THE WHOLE COURT was of opinion, that this leaſe was void; and judgment was given accordingly.

(*a*) Year Books 13. *Hen.* 8. pl. 10. 14. *Hen.* 8. 2. 29. Dyer, 304. Cro. Jac. 234.

MICHAELMAS TERM,

The Eleventh of George the First,

IN

The King's Bench.

Sir John Pratt, *Knt. Chief Juſtice.*
Sir Lyttleton Powys, *Knt.*
Sir John Forteſcue Aland, *Knt.* } *Juſtices.*
Sir Robert Raymond, *Knt.*
Sir Philip Yorke, *Knt. Attorney General.*
Sir Clement Wearg, *Knt. Solicitor General.*

Barnſly *againſt* Shrimpton.

Caſe 221.

A WRIT OF ERROR was brought, and the general error aſſigned, and likewiſe the want of an original, and a warrant of attorney.

After a plea in *nullo eſt erratum*, it is never admitted to amend general errors.

2. Lev. 80.

After *in nullo eſt erratum* pleaded, a rule of court was obtained to amend the errors aſſigned.

But it was diſcharged upon a motion for that purpoſe; for after ſuch a plea it is never admitted * to amend general errors; it is like *not guilty* pleaded by the defendant, who is never admitted after ſuch a plea to juſtify, or to plead ſpecially.

* [305]

Cowper *againſt* Ginger.

Caſe 222.

THE PLAINTIFF obtained judgment againſt two defendants in an action of debt, and one of them brought a writ of error, when it ſhould have been brought by both, and he who did not proſecute ought to have been ſummoned and ſevered; which not being done,

If judgment in debt be againſt two defendants, both muſt join in a writ of error.

S. C. poſt. 317. S. C. ante, 16. 81. S. C. 2. Stra. 606. S. C. 2. Ld. Ray. 1403.

COWPER *against* GINGER.

This was held to be a fault not amendable.

And thereupon the writ of error was quashed. The like judgment was given in *Hilary Term*, in the sixth year of *George the First*, in the case of *Brewer v. Turner (a)*.

(a) Stra. 232. See also Vavasour *v.* Vaux, 1. Will. 88. 3 Burr. 1792. Latoch *v.* Washborough, 2. Term Rep. 738. Knox *v.* Costello,

Case 223.

Bond *against* Turner.

Proceedings on a *scire facias* against bail shall be stayed if there were only four days between *the teste* and *return* of *fi. fa.* against the principal.

Stra. 419. 443. 1. Com. Dig. "Bail" (R. 1.). 1. Burr. 340.

JUDGMENT was obtained by the testator, who died, and his executor sued out a *scire facias* against the defendant, and had judgment therein, and then he sued out a *capias ad satisfaciendum* against him, and upon *non est inventus* returned, he sued out a *scire facias* against the bail.

And, upon a motion made to stay the proceedings against them, as being irregular, because there were but four days between *the teste* and *the return* of the *scire facias* against the principal, that motion was granted.

And then the plaintiff moved to quash all the proceedings for his own expedition, which was likewise granted upon payment of costs.

Case 224.

Savill *against* Snell.

In covenant to find board and lodging or to pay 20l. the defendant may pay the money into court.

Post. 345. 397. Salk. 597. 1. Vent. 356. Stra. 515. 814. 957. 2. Burr. 1120. 3. Burr. 2370.

IN AN ACTION OF COVENANT in certain articles of agreement, wherein the defendant covenanted to find diet and lodging for the plaintiff for a year, or to pay him ten pounds:

The defendant, upon affidavit made that there was not above ten pounds due to him, moved to bring it into court, and that the plaintiff might proceed at his peril.

THE COURT could not ascertain what was due for diet and lodging; but because the agreement was in the disjunctive, *viz.* to find diet and lodging, *or* to pay ten pounds, a rule was made, that the defendant might bring it into court *(a)*.

5. Com. Dig. "Pleader" (C. 10.).

(a) See Hallet *v.* East India Company, that wherever the sum demanded is certain, or may be ascertained by computation, without the intervention of a jury, it may be paid into court, 2. Burr. 1120.

*[306]

Case 225.

* Hehly *against* Rolfe.

After an arrest the plaintiff must declare in two terms.

6. Mod. 22. 254. Tidd's Pract. 193.

THE DEFENDANT was arrested, and no declaration being filed against him within two Terms after the arrest, he procured a *supersedeas* and was discharged, and immediately afterwards he

5. Com. Dig. "Pleader" (C. 2.).

was

was arreſted again by a *capias* out of the common pleas, at the ſuit of the ſame plaintiff, and for the ſame cauſe of action. HENLY *againſt* ROSSE.

And upon a motion to diſcharge theſe proceedings, becauſe irregular,

THE COURT was of another opinion, for that the defendant had a right to ſuperſede the action, becauſe no declaration was filed againſt him in time; and as he had a right to ſuperſede that action, certainly the plaintiff muſt have liberty to proceed in another; for his debt is not loſt for want of declaring in time, but only that action is gone, and therefore a new action may be brought.

Lawſon *againſt* Dickenſon. Caſe 226.

THE PLAINTIFF had an eſtate mortgaged to him, and the defendant, who was *an attorney*, and who drew the mortgage, did by that means get all the deeds relating to the title into his poſſeſſion, and now refuſed to deliver them to the plaintiff, unleſs the mortgagor would pay a debt due from him, as the defendant pretended.

Where deeds are delivered upon a ſpecial truſt, the party cannot detain them. Poſt. 340. 12. Mod. 516. Imp. Pract. 69.

And now, upon a motion for a rule to deliver the deeds to the plaintiff, for that he (the defendant) made the mortgage, and therefore ſhall not be allowed any money due to him from the mortgagor, before or after the mortgage, but that he ſhould deliver up the deeds upon payment of what is due for drawing and engroſſing it;

THE COURT was of opinion, that an attorney may detain papers until the money is paid for drawing them; but that he cannot detain any writings which are delivered to him on a ſpecial truſt, for the money due to him in that very buſineſs; therefore a rule was made for the defendant to deliver thoſe deeds to the plaintiff.

The like rule was made in the caſe of *Hooper v. Hayward (a)* this Term, that an attorney ſhould deliver ſeveral deeds of lands which he received for a certain purpoſe, and would have kept them, becauſe he pretended his client had a mortgage on thoſe lands; and the rule was, that he ſhould deliver * them by ſuch a day, or an attachment ſhould go againſt him; and accordingly he delivered them up on the day, but was ordered to pay coſts and ſuch damages to the party, as THE MASTER ſhould think reaſonable for what the plaintiff had ſuſtained for want of the deeds; becauſe it appeared that the defendant had received the profits, and kept the plaintiff out of poſſeſſion by this means. And in the caſe of *Geary v. Faſhion (b)*, a rule was granted for *an attachment* againſt the defendant for not delivering deeds to the plaintiff; and the like rule in the caſe of *Strong v. How (c)* for not delivering deeds given to him in order to borrow money on them. * [307]

(a)
(b)
(c) Poſt. 339.

Caſe 227.

Elliott *againſt* Cowper.

A declaration ſtating that *A.* made a promiſſory note, and that the plaintiff demanded the money of the *ſaid A.* is a ſufficient averment of the *identity* of *A.*

AN ACTION was brought againſt *the indorſer* of a promiſſory note, wherein the plaintiff declared, that one *Coates* "*fecit* "*notam in ſcriptis*," omitting the words "*manu ſuâ ſubſcript.*" by which he promiſed to pay to the defendant, or order, ſo much money, &c.; that the defendant indorſed this note to the plaintiff; and that, although he demanded the money *de eodem Coates*, he did not pay it.

S. C. 1. Stra. 609. S. C. 2. Ld. Ray. 1376.

The defendant demurred ſpecially, for that the plaintiff did not ſet forth that *Coates* of whom the money was demanded, was the ſame *Coates* who drew the bill.

TO WHICH *it was anſwered*, that the declaration ſets forth that the note was made by one *Coates*, and that the plaintiff demanded the money *de eodem Coates*, which is a good and certain averment that he was the ſame perſon.

And THE COURT was of that opinion.

A declaration on a promiſſory note, ſtating that *A. made* the note, imports that he *ſigned* it.

SECONDLY, It was objected, that the ſtatute 3. & 4. *Anne*, c. 9. which gives credit to ſuch notes, and a remedy to recover on them where there was none at law, enacts, that "all "notes ſigned by any perſon, &c." and it doth not appear by this declaration that *Coates* ſigned this note.

1. Ld. Ray. 512. 2. Ld. Ray. 1542.

TO WHICH *it was anſwered*, that the plaintiff ſet forth that *Coates fecit notam*, which implies ſigning it; for he could not make it without ſigning it (*a*).

The plaintiff had judgment.

(*a*) Same point determined accordingly in Taylor v. Dobbins, 1. Stra. 399. See alſo Smith v. Jarvis, 2. Ld. Ray. 1484.

Caſe 228.

The King *againſt* Roberts.

An action will not lie in *the Marſhalſea* for a malicious proſecution in the *king's bench*.

THE DEFENDANT was indicted and acquitted in this court, and afterwards brought an action in THE MARSHALSEA againſt the proſecutor for a malicious proſecution; upon which the defendant in the action was held to ſpecial bail.

* [308]

* KETTLEBY now moved to ſtop the proceedings there, becauſe this Court being poſſeſſed of the principal cauſe, may better judge whether the proſecution was malicious or not.

F. N. B. 116. 7. Co. 1. 2. Com. Dig. "Action of "Conſpiracy" (C. 2.).

STRANGE *contrà* inſiſted, that debt lies in THE MARSHALSEA, or in any other inferior court, upon judgments in the courts of *Weſtminſter* (*a*). The reaſon of ſuing below, is for the advantage of holding the defendant to bail; and there is a cuſtom in that court, that the attorney ſhall anſwer for ſuch bail as he takes; ſo

(*a*) 1. Sid. 180. 2. Salk. 209.

that

that if the proceedings ſhould be ſtayed, the plaintiff would loſe that benefit which he has below againſt the attorney; for in truth the bail are worth nothing.

THE KING *againſt* ROBERTS.

THE COURT: It is highly inconſiſtent to have the reaſonableneſs of ſuing here determined below; whereas there are any particular circumſtances of aggravation, a Judge may require ſpecial bail, though the writ does not require it (*a*). However, if we ſtay the proceedings below, we will order the defendant to find ſpecial bail; which the defendant below agreeing to, the proceedings were ſtayed.—The Court agreed the caſes in *Salkeld* and *Sidderfin* to be law.

(*a*) See 12. *Geo.* 1. c. 29.

Anonymous. Caſe 229.

AN EXECUTOR moved the Court to enlarge the time for pleading, the rules being out.

An executor, to obtain time to plead, muſt undertake not to plead any judgment obtained after his time for pleading expires.

This was oppoſed, unleſs he would enter into a rule not to plead any judgments obtained againſt him after the rules were out; for otherwiſe he might confeſs judgments in the mean time, and plead them in bar to the plaintiff's demands.

THE COURT ſaid, they would not deprive the plaintiff of any advantage he had by law to recover his debt, unleſs the defendant would enter into ſuch a rule; which he refuſing, the Court would not enlarge the time,

1. Bulſt. 122. Tidd's Pract. 248.

The King *againſt* The Hamlet of Spitalfields. Caſe 230.

THE CASE, upon an order of removal, was thus: The huſband worked at a ſilk-throwſter's in the hamlet of *Spitalfields* for five years, but never lay where he worked, but at a lodging elſewhere. The juſtices of peace being of opinion, that the huſband had gained a ſettlement by this means, did, after his death, by an order, remove his widow thither, which order was confirmed upon an appeal.

The ſettlement is where the party dwells, and not where he works.

S. C. 2. Bott, 457. S. C. Fort. 307. Poſt. 370.

But both the orders were quaſhed, becauſe THE COURT was of opinion that the huſband's working there gained no ſettlement; and ſo it was reſolved in *the Cobler's Caſe* (*a*) who worked in a ſtall in the pariſh of *St. Giles's*, and had an apprentice who worked with him in that ſtall, and both lay in another pariſh; it was adjudged that the working in the ſtall did not gain a ſettlement, for that was in the pariſh where * he lay, and that a man cannot be removed from his work, conſequently his working in a certain place ſhall not gain any ſettlement there (*b*).

* [109]

(*a*) Stra. 51. Sett. & Rem. 82. (*b*) See 2d vol. of Mr. Conſt's edition of Bott's Poor Laws, 561.
Seſſ. Caſ. 115. Foley, 222. 2. Bott, 961. pl. 506.

Case 231.

The King *against* Austin.

An order of justices for the suppressing of an alehouse, must state the county in which the alehouse is situated; for the county in the margin refers only to the place where the order was made; but it need not aver it to be a *common alehouse*, or state that the party was *summoned*.

S. C. Sett. & Rem. 123. S. C. Fort. 325.

AN ORDER OF SESSIONS was made to hinder the defendant from selling ale; and the exceptions following were taken to this order;

FIRST, That it did not appear by the order that it was a *common alehouse*: every alehouse may not be a common alehouse.

SECONDLY, It does not appear that the defendant was *summoned*, or present when this order was made.

THIRDLY, The county is only in the margin, and not in the body of the order; so that it does not appear in what county this alehouse is; which is necessary to the jurisdiction of the justices. Orders of settlement for removal of poor persons are ill, without shewing the place from which they are removed to be within the county (*a*).

AS TO THE FIRST EXCEPTION *it was answered*, that every alehouse is a common alehouse.

AS TO THE SECOND EXCEPTION, that he was not summoned to appear before the justices: it is true, a summons had been necessary if the statute 5. & 6. *Edw.* 6. c. 25. had not given the sessions or two justices an absolute power to put down alehouses at their discretion; so that where they have an unlimited power, it is not necessary to set forth any summons in their order; neither is a summons ever set out in orders, but in convictions for deer-stealing or the like, where great fines are imposed, there it is usual to set forth that the party was summoned; but it is not so in orders for bastardy.

AS TO THE THIRD and most material objection, that the county was not in the body of the order, but only in the margin, it was said, that it was not necessary it should be in the body of the order, because it was no crime to keep an alehouse: it is true, in all criminal cases, either upon indictments, convictions, or orders, if the county be only in the margin, and not in the body of the order, the proceedings ought to be quashed; and so it has been resolved several times, as in the case of *The King v. Sheringham* (*b*), and *The King v. Marsh* (*c*), because the county in the margin shews only that the order was made in that county, but not that the alehouse was there, or that the person who kept it lived in that county; so that the justices of the county have no jurisdiction.

PRATT, *Chief Justice*. There is no difference between an alehouse, and a common alehouse. If an alehouse be suppressed for any disorder (*d*) or offence committed by the party, he ought to be *summoned*; otherwise when it is suppressed by the discretionary power of the justices (*e*). An alehouse may be suppressed, as

(*a*) Sett. & Rem. 115. pl. 151. Sess. Cases, 279. pl. 181.

(*b*) Easter Term, 8. Geo. 1.

(*c*) 1. Salk. 472.

(*d*) See Rex v. Allington, Stra. 678. Rex v. Athony, 2. Burr. 653.

(*e*)

Lord

Lord Hale (a) says, if kept in an inconvenient place. The order does express it to be a disorderly house, and a common bawdy-house.

FORTESCUE, *Justice.* It was a question in LORD HOLT's time, whether justices were bound to give a reason why they suppressed an alehouse (*b*)? He was of opinion they ought, because the party had a right or interest vested in him by the licence (*c*). Here a reason is given, it being a *disorderly house.* I do not remember it has ever been held necessary to shew a summons upon these convictions: the distinction has been between *mandamus's* and convictions by reason of the greatness of the punishment. In an order of bastardy a summons is never shewn (*d*). And PARKER, *Chief Justice*, said, the objection had been often taken to orders of bastardy, but never prevailed. A conviction of deer-stealing saying "having been summoned," is sufficient (*e*).

PRATT, *Chief Justice. Major sit, an minus, non differt*; be the punishment greater or less, it makes no difference; the party in each case ought to be summoned, and the summons ought to be set out.

RAYMOND, *Justice.* I remember upon a motion of my own, an objection for want of a summons was taken to an order for suppressing an alehouse, but the order was confirmed. The distinction taken by FORTESCUE, *Justice*, seems very reasonable.

* THE COURT demanding of THE SECONDARY how the precedents were in such cases, he answered, that the Court was divided, as to this matter, in a case between *The King v. Glegg (f)*, which was in a case of bastardy; and that the name of the county in the margin has been held good in some orders of removal. * [310]

THE COURT. The third exception is fatal. In all *criminal prosecutions* it will not be sufficient to put the county in the margin; for that can only prove the order made by the justices of that county, but is no argument that the fact was committed in that county. No difference between indictments and orders (*g*). This is a criminal prosecution, for it is adjudged a bawdy-house, and suppressed as such.

Adjournatur (*h*).

(*a*)

(*b*) See Rex *v.* Young, 1. Burr. 556. Rex *v.* Williams, 3. Burr. 1317.

(*c*) 1. Salk. 471.

(*d*) The Queen *v.* King.

(*e*) Rex *v.* Simpson, 1. Stra. 44.

(*f*) Ante, 3.

(*g*) Rex *v.* Marshall, Trinity Term in B. R. 10. *Geo.* 1.

(*h*) It is said S. C. Fort. 325. that on consultation and precedents the order was quashed on the third exception, 2. Ld. Ray. 1406.

Caſe 232.

Graves *againſt* King.

Where the judgment ſhall be as of the firſt day of the Term.

Skin. 257. 4. Com. Dig. "Execution" (D. 2.).

THE PLAINTIFF had judgment in *Hilary Term* 1722, which was now three years ago, which judgment was ſigned the fourteenth day of *February*, two days after that Term, and the execution bore *teſte* the twelfth day of *February* 1723; and no *ſcire facias* firſt ſued out to revive the judgment.

RABY urged this to be irregular, for the judgment relates to the firſt day of the Term, ſo that there is above a year between the judgment and the execution. The day of ſigning the judgment, which is required by 29. *Car.* 2. c. 3. has no other relation than as it affects purchaſers, in reſpect to the plaintiff and the defendant; and as to all other purpoſes, it is a judgment of the firſt day of *Hilary Term* 1722, by fiction of law; ſo that the *teſte* of the execution ought to be the firſt day of that Term, otherwiſe it is wrong; and therefore it was moved to quaſh this execution.

FAZACKERLY *contrà* ſaid, that the plaintiff was right in point of fact, though he was wrong by a fiction in law.

Therefore IT WAS MOVED, that the plaintiff might have leave to enter continuances to the laſt day of this Term, ſo as to make it a judgment of that day; or that he might have leave to get the judgment ſigned as of the ſucceeding Term, as a fine taken in Vacation may be entered either of the preceding or ſucceeding Term.

But THE COURT denied leave to enter continuances, this being now a record of three years ſtanding, neither would they give leave to enter the judgment as of the ſucceeding Term: it is true, it has been done in fines, but theſe are by the agreement of the parties, but judgments are obtained upon adverſary ſuits; therefore the judgment in the principal caſe muſt be of the firſt day of *Hilary Term*.

THE COURT was divided as to quaſhing this execution.

PRATT, *Chief Juſtice*, and POWYS, *Juſtice*, were of opinion that the Court ought not to interpoſe to ſet aſide the execution.

FORTESCUE and RAYMOND, *Juſtices*, held the execution void. It is not by a fiction of law, it is the law itſelf, that all judgments, though ſigned the laſt day of the long Vacation, are judgments of the firſt day of the Term preceding: it cannot be a judgment of the fourteenth of *February*, for the Court gives no judgment in Vacation. A fine taken in Vacation may be entered either of the Term precedent or ſubſequent, it being the agreement of the parties.

THE COURT being divided, no rule could be made; wherefore let the execution ſtand.

Skipworth

*Skipworth *againſt.* Green.

Caſe 233.

IN AN ACTION OF COVENANT for non-payment of rent reſerved on a leaſe for years made by the plaintiff, as guardian to *Lord Craven*, wherein he demiſed meadow, paſture, and arable land to the defendant, and amongſt the reſt "all thoſe two cloſes called or "known by the name of *Lane's meadow*," and the defendant covenanted to pay the rent, and alſo five pounds an acre for every acre of meadow or paſture ground which he ſhould break up or plough; and the breach aſſigned was, that the defendant had ploughed up *duo prata vocat. Lane's meadow*, by reaſon whereof he is to pay five hundred and ſixty pounds, and for non-payment thereof this action was brought.

In covenant on a leaſe demiſing meadow, paſture, and arable lands, and deſcribing two cloſes by the name of "*Lane's* "*meadows*," in which the leſſee covenants to pay 5l. for every acre of *meadow* he ſhall plough; if the breach be aſſigned in ploughing up two meadows called "*Lane's* mea- "*dows*," the defendant may plead that the lands called "*Lane's* mea- "*dows*" were time out of mind *arable*, and traverſe them being *meadow*; for the words "*Lane's* "*meadow*" in the leaſe being deſcriptive of the *local ſituation*, and not of *the nature* of the land, they do not *eſtop* from trying the fact.

S. C. 3. Danv. 272. S. C. 1. Stra. 610.

The defendant juſtifies, for that the lands called *Lane's meadow* were, time out of mind, arable lands; ABSQUE HOC, that they were meadow lands.

REEVE *for plaintiff*, upon a demurrer to this plea, inſiſted that it was ill, becauſe the defendant, who is a party to the indenture, ſhall not be admitted to ſay that *Lane's meadows* are arables, becauſe it is contrary to the indenture itſelf, by which he is *eſtopped* to ſay that thoſe lands are not meadow; and this appearing on record, the plaintiff need not plead and rely upon it, but ſhall take advantage of it by demurrer; and the defendant having joined in demurrer, the plaintiff muſt have judgment.

HAWKINS, *Serjeant*, anſwered, that the plaintiff demiſed meadow, paſture, and arable lands to the defendant; now if the lands called *Lane's meadows* are not arable, then that word muſt be rejected, for without thoſe meadows there is no arable land at all. As to the *eſtoppel* it cannot be, becauſe the leſſee cannot be eſtopped by the words of the leſſor, for the calling the lands by the name of *Lane's meadows*, are the words of the leſſor, by which he deſcribes the lands as meadow. It is true, any of the parties to an indenture are eſtopped to contradict or deny eſſential words of the deed; but in this caſe they are only deſcriptive words of a meadow which is not really ſo, therefore this is not contrary to any of the eſſential words of the deed, eſpecially ſince the names of lands are taken from reputation in old deeds to preſerve the evidence of ſuch lands, which otherwiſe might be loſt, and is ſeldom regarded by any lawyer in drawing conveyances, for the names of the parcels are entirely left to the clerk. * *Eſtoppels* are odious in law, and admitted merely out of neceſſity (*a*), becauſe they are concluding to ſpeak the truth; as for inſtance, a ſtranger joined with the owner of the land in making a leaſe; now though in reality this was the leaſe of the owner, yet it is likewiſe the leaſe of the ſtranger by concluſion, otherwiſe his ſigning it would be to no purpoſe, ſo that it is an eſtoppel by neceſſity. Beſides, covenants and agreements are

*[312]

(*a*) Co. Lit. 45. a.

SELSWORTH *against* GREEN.

to be taken according to the intention of the parties; and when the defendant covenanted to pay five pounds for every acre of meadow he ploughed up, it muſt be intended for every acre which was really meadow, and not for *cloſes* called *meadows*.

If a leaſe be made by A. as guardian to B. the leſſee is eſtopped to ſay, that being only tenant at will, he had no power to make the leaſe.

1. Term Rep. 791.

SECONDLY, It was objected againſt the declaration, which is, that the plaintiff, as guardian to the *Lord Craven*, made this leaſe; now, every guardian (except a guardian in ſocage, which the plaintiff does not appear to be) is but tenant at will (*a*), and by conſequence cannot make a leaſe for any certain time, or number of years, and if ſo, then this leaſe for years is void; and ſo are all the covenants depending thereon; and therefore the plaintiff has no right to this action; and all this matter being on the ſame record, the defendant is not eſtopped to ſhew it (*b*).

TO THIS IT WAS REPLIED *for the plaintiff*, that there are five hundred acres of land demiſed, and certainly ſome of them muſt be arable; but the two cloſes are ſpecially to be meadow by an *ac etiam demiſit duo prata* VOCAT. *Lane's meadow*: and as to the objection, that thoſe are the words of the leſſor, and therefore ſhall not conclude the leſſee, it is not ſo in an indenture, for there the words "grant and demiſe" are the proper words of the leſſor: and yet the defendant is eſtopped from pleading "*non demiſit*" though it is otherwiſe in a deed-poll, for there the leſſee may plead, that the leſſor *nil habuit in tenementis*, &c.

As to the objection to the declaration, *viz.* that the plaintiff appears on record to be *guardian*, who is but a tenant at will, and cannot make a leaſe; this is contrary to the indenture; and the ſetting him forth to be a *guardian*, is only a deſcription of the perſon, but does not prove that he who made the leaſe is ſuch; he may have a greater intereſt than barely as guardian; therefore the leſſee who enjoys this land by virtue of and under this leaſe, is eſtopped to ſay, that the leſſor had no right to make it; and the rent ought to be paid as long as the defendant enjoys the land.

PRATT, *Chief Juſtice*. The leſſor demands five pounds an acre for every acre of meadow ploughed by the defendant; and to entitle himſelf thereunto, lays the ploughing the lands called "*Lane's* "*meadows*;" the defendant pleads, that the lands called "*Lane's* "*meadows*" are not meadow, but arable lands time out of mind; * [313] the plaintiff * demurred, for that it is called meadow in the indenture of leaſe, and the defendant joined in demurrer. Now it muſt be conſidered, that deeds muſt be conſtrued according to the intention of the parties, and that the name of "meadow" in this deed is only a deſcription of the land by reputation, and no direct averment that it is meadow; therefore to plead that they are not meadow, is not contrary to the intent of the parties. It is true, it is ſaid that the plaintiff demiſed *duo prata* VOCAT. *Lane's meadow*; now though they were not really meadow, yet by this de-

(*a*) Co. Lit. 57. (*b*) Co. Lit. 352. 1. Lev. 45.

ſcription

ſcription they would paſs in this deed, and therefore it would be too ſtrict, and plainly againſt the intent of the parties, to conſtrue this to work an eſtoppel. Now the reſervation of the rent of five pounds an acre for every acre ploughed by the defendant, muſt be intended for every acre which is really meadow, and not for acres called "meadow," for the name is but the deſcription of the land, and often differs from the nature of it; for if the nature of the lands ſhould be taken from the name, then all thoſe great improvements of the marſh-lands in *Lincolnſhire*, which are ſtill called "marſh" in deeds, would likewiſe ſtill be marſh. It has been truly ſaid at the bar, that *eſtoppels* are odious in the law; and it would be very hard that the defendant ſhould be bound by this deſcription; and though all the parties to an indenture are bound by the words thereof in point of law, becauſe they agree to it; yet that muſt be intended of material words, and not to every minute and deſcriptive words and circumſtances. Now if theſe two cloſes had been demiſed as containing five hundred acres, and ſo mentioned in the indenture, certainly the defendant would not have been eſtopped to ſay there were not ſo many acres. Skrymsher *againſt* Gaszn,

THE COURT was clearly of opinion, that the plea was good.

Sed adjournatur (*a*).

(*a*) It is ſaid S. C. 1. Stra. 610. that the whole Court was of opinion, that the defendant had a right to try the fact, whether it was ancient meadow or not, and therefore that the plea was good, and that the defendant muſt have judgment. And S. C. 3. Danv. Abr. 272. ſays it was ſo adjudged.

Welder *againſt* Buckler. Caſe 234.

In what manner the judgment muſt be ſet out in a *ſcire facias* againſt pledges in replevin.

SCIRE FACIAS againſt the pledges in a plaint in *replevin*. The plaint was removed into the court of common pleas, where the plaintiff declared, &c. and the defendant avowed the taking, &c. as a diſtreſs for rent, and had judgment to have a *return irreplevyable*.

A WRIT OF ERROR was brought in the court of king's bench, and the judgment was affirmed, and then a precept was directed to the ſheriff to make a return of the goods to the defendant. The ſheriff returned an *elongata*. S. C. 1. Stra. 611.

The defendant thereupon brought a *ſcire facias* againſt the * pledges (*a*), in which he ſet forth, that he had recovered judgment in the court of common pleas, "*prout patet de record', &c.* "*in communi banco*, which judgment was affirmed in error in the "court of king's bench, *prout patet, &c.*" The defendant pleads that the record remains in the court of common pleas. * [314]

On demurrer ſpecial,

(*a*) 5. Com Dig. "Pleader" (3. K. 5.).

REEVE

WELDER *againſt* BUCKLER.

REEVE *for the plaintiff* argued, that a writ of error upon a judgment in the court of common pleas, removes the record itſelf, and not only the tranſcript; for execution is awarded by this Court if the judgment is affirmed. A writ of error returnable in the exchequer-chamber is different; for there the tranſcript only is removed.

BRAINTHWAITE, *Serjeant*, then excepted to the *ſcire facias* for inconſiſtency: it ſhews that judgment was recovered in the court of common pleas *prout per record. remanen. in C. B. plenius apparet*; that error was brought in the court of king's bench where judgment was affirmed, *ut per record. remanen. in B. R. plenius apparet.*

THE COURT. *Scire facias's* have been often amended: However, let the plaintiff diſcontinue on payment of coſts.

Caſe 235.

Theed *againſt* Starkey.

A covenant to pay taxes on the land does not extend to the rates to church and poor.

COVENANT againſt an executor for not paying taxes according to a covenant in a leaſe made by his teſtator, wherein he covenanted with the leſſee to pay all the taxes on the lands demiſed; and the breach aſſigned was, for not paying the rates to the church and poor,

3. Bulſt. 354. Cowp. 453 Dougl. 411. 427.

Upon demurrer to the declaration IT WAS OBJECTED, that the breach was not well aſſigned, becauſe thoſe rates are perſonal charges (*a*), and not on the land.

And for this reaſon the defendant had judgment.

(*a*) 5. Co. 67.

* [315]

Caſe 236.

Wyvell *againſt* Stapleton.

If a judgment for the defendant in the common pleas be reverſed on a writ of error in the king's bench, the plaintiff is not intitled to the coſts of the writ of error, but to thoſe only which he would have had on a judgment in his favour in the common pleas.—S. C. 1. Stra. 615. 6. Mod. 88. 2. Ld. Ray. 992. 1. Bac. Abr. "Coſts" (G.). 2. Burr. 1097. Hullock on Coſts, 294. Tidd on Coſts, 39.

UPON AN ACTION brought in the court of common pleas on a *South-Sea* contract, the defendant had judgment; and upon a writ of error brought in the court of king's bench, that judgment was reverſed, and judgment that the plaintiff in error ſhould recover his debt and coſts, as he ſhould below.

* WELDON moved, that the plaintiff in the original action might recover his coſts thereof; for this Court is not only to reverſe the firſt judgment, but ought to give the ſame judgment as the court of common pleas ſhould have given; in which caſe coſts would have been recovered. By the ſtatute of *Glouceſter*, c. 1. the plaintiff is to recover "the coſts of his writ purchaſed," which is expounded to intend to all the legal coſts of the ſuit (*a*). We

(*a*) 2. Inſt. 288.

do

do not pray coſts of the writ of error, but coſts for the delay occaſioned by the writ of error. In the caſe of *Mulcary v. Eire* (*a*), judgment in *Ireland* was reverſed, and no judgment given for the damages and coſts. There is no caſe in point.

REEVE *contra*. No coſts were recoverable at the common law upon a writ of error. The ſtatute of 3. *Hen.* 7. c. 10. is the firſt ſtatute that gives coſts on a writ of error; but neither that ſtatute nor the 8. & 9. *Will.* 3. c. 11. extend to writs of error where judgment is reverſed; only when judgment is affirmed, or the writ of error diſcontinued. There is no precedent for coſts upon the reverſal of a judgment.

THE COURT. In the caſe of *Mulcary v. Eire* no coſts were given but on the original judgment. If any coſts are recoverable in this caſe, it muſt be on the ſtatute of *Glouceſter*; no other ſtatute has given coſts. We are to give the ſame judgment as the common pleas ought to have given; and how could they adjudge coſts for the writ of error? HOLT, *Chief Juſtice*, called a writ of error a revivor of the cauſe and removal thereof.

Adjournatur (*b*).

(*a*) Cro. Car. 511. See alſo 2. Saund. 257. 1. Ld. Ray. 427.

(*b*) It is ſaid S. C. 1. Stra. 617. that the Court ordered the maſter to tax the plaintiff ſuch coſts as he would have been intitled to in the court of common pleas, but refuſed to allow him coſts upon the writ of error in the king's bench.

Wilſon *againſt* Aldridge.

Caſe 237.

Sheriff ordered to return his writ.

THE PLAINTIFF obtained a judgment at law, and afterwards, by a *fieri facias* directed to the ſheriff, he levied the debt on the goods of the defendant, who exhibited a *bill in equity* againſt the now plaintiff, ſuggeſting that there was more due to him from the plaintiff than he recovered; and ſo got an injunction to ſtay the money in the ſheriff's hands.

The plaintiff and his attorney, being priſoners in THE FLEET, moved the Court againſt the ſheriff, to return the writ of *fieri facias*, and that he might be amerced till he do.

And now the Court was moved in behalf of the ſheriff for direction what to do; for if he returned his writ he muſt pay the money, and then the court of chancery would commit him for not obeying the injunction; and if he did obey it, then the court of king's bench would amerce him.

THE COURT would not take any notice of the proceedings in chancery, but ordered the ſheriff to return his writ, otherwiſe they would commit him. *[316]

Then the Court being deſired to help the ſheriff to diſcover what attorney or ſolicitor carried on the proſecution againſt him, they refuſed ſo to do, becauſe that would be only to enable the ſheriff to move the court of chancery for *an attachment*; ſo he had no relief.

Townſend

Caſe 238. Townſend *againſt* The Aſſignee, and ſeveral Commiſſioners of Bankruptcy.

Barriſter at law being joined with another, hath no privilege to change the venue.

A MOTION was made to change *the venue* from *Worceſterſhire* to *London* or *Middleſex*, for that there would be a very great inconvenience to carry down all the proceedings of the commiſſioners; beſides, one of them is A BARRISTER AT LAW, and two others are *attornies*; and it is the conſtant rule of this Court to allow them to change *the venue* in all tranſitory actions, either to *London* or *Middleſex*; and the rather in this caſe, becauſe all the aſſignees and commiſſioners are made defendants; and the only evidence which can be againſt them, is what they have done as commiſſioners here.

THE COUNSEL *for the plaintiff* allowed the commiſſion to be good, and the proceedings under it; but that the fact on which this action was founded, was done in *Worceſterſhire*, which was the taking the plaintiff's goods; and the privilege of A COUNSELLOR or *attorney* was never carried farther than when they were concerned in the action in their own right; for where another is joined with them, that privilege is never allowed; beſides, the bankrupt himſelf lived in *Worceſterſhire*.

THE COURT would not change *the venue*, becauſe the plaintiff obliged himſelf to give evidence only of ſuch matters as happened in *Worceſterſhire*; and when another is joined in a ſuit with A COUNSELLOR AT LAW, or that it is *in auter droit*, he has no ſuch privilege as to change *a venue*.

Caſe 239. Cowper and Miles *againſt* Ginger.

On a writ of error being quaſhed, becauſe not brought by *all* the parties to the judgment, the defendant ſhall have *coſts*.

A WRIT OF ERROR was brought by *Miles* upon a judgment given in the court of common pleas againſt *Cowper* and *Miles*, which writ of error was quaſhed becauſe *Cowper* did not join in it. *Ginger*, the defendant in error, thereupon moved for *coſts*, as if the judgment had been affirmed (*a*). But * *Miles* and *Cowper* brought another writ of error (*b*) *de recordo quod coram vobis reſidet*.

*[317] And IT WAS OBJECTED, that the defendant in error is not intitled to coſts, unleſs that writ is likewiſe quaſhed.

(*a*) See 4. *Ann.* c. 16. ſ. 25. "that "upon quaſhing any writ of error for "variance from the original record or "other defect, the defendants in ſuch "error ſhall recover, againſt the plaintiff "or plaintiffs iſſuing out ſuch writ, his "coſts, as he ſhould have had if the "judgment had been affirmed, and to "be recovered in the ſame manner"—See alſo 8. & 9. *Will.* 3. c. 11. ſ. 2.

(*b*) It lies on a judgment in the king's bench for any error in the record, as want of an original, &c. or concerning matters of fact, as nonage, death of the party; for error in fact is not the fault of the Court; therefore it may be determined by the Judges when the record is before them.—NOTE *to the former edition*.

But

But IT WAS ARGUED, that a writ of error *coram vobis* would not lie in this caſe, becauſe the record was not removed by the firſt writ of error; for the difference is, where the firſt writ of error abates or is diſcontinued, there the record is removed, and error *coram vobis* will lie; but where there is a variance in the ſtile of the court, or the parties are not ſufficiently deſcribed, there the writ of error muſt be quaſhed; and in ſuch caſe the record is not removed, becauſe it varies from the writ; and conſequently the record being not removed, a writ of error *coram vobis* will not lie. Now in this caſe the record is fully deſcribed in the writ, and there is no manner of variance between the one and the other; and the caſe is no more than if an action ſhould be brought by one, where it ought to be brought by two, there the action muſt abate; and the quaſhing the firſt writ of error was in nature of an abatement, becauſe the record being ſufficiently deſcribed in the writ, it abated or was quaſhed, becauſe it was brought by one, when it ſhould be brought by two; therefore the writ of error being naught, the record was not removed; and if ſo, error *coram vobis* does not lie; neither is there anything inconſiſtent in the record but "*ad dam-*" "*num ipſius*," when it ſhould be "*ad damnum ipſorum.*" Now the firſt writ of error was quaſhed for matter appearing on the record itſelf, and it was never a good writ; and if ſo the record was never removed, for the firſt writ ought to be brought by both, becauſe both entered into the recognizance; but it being brought by one alone, he has no right to examine the errors alone; therefore he ought to have joined the other in the writ, and if he had been unwilling to proceed, he ſhould be *ſummoned* and *ſevered* (*a*).

If judgment be given againſt *two* perſons, and a writ of error, in which the record is rightly deſcribed, be brought by *one* of them only, yet the record is thereby removed although the writ is quaſhed.

S. C. ante, 16. 81. 305. S. C poſt. 381. S. C. 1. Stra. 606. 1. Stra. 262. 1. Ld. Ray. 151. 1. Wilſ. 88. Burr. 1792. 2. Term Rep. 738. 5. Com. Dig. "Pleader" (3. B. 13.).

PRATT, *Chief Juſtice*, ſaid, that if *a ſtranger* ſhould bring a writ of error in this court of a judgment in the common pleas, the record is not thereby removed, which he compared to the preſent caſe, where the writ of error was * brought by one when two ought to join.

* [318]

And THEY WERE ALL OF OPINION, that the defendant in error ſhould have coſts, though that writ was quaſhed, as if the judgment had been affirmed.

As to the writ of error *coram vobis*, they ordered to ſearch precedents.

Afterwards THREE OF THE JUDGES were of opinion, that error *coram vobis* did lie; and they grounded their opinion upon the caſe of *Walker v. Stokoe* (*b*), which was thus: Judgment in treſpaſs againſt five defendants, and a writ of error being intended to be brought, the attorney left a note with THE CURSITOR to make it out between the plaintiff in error, and five more, naming them:

If a record is removed by a writ of error, and the writ is abated or quaſhed, the party may bring error *coram vobis reſidet.*

1. Roll. Abr. 753. Yelv. 6. 2. Ld. Ray. 1403. 5. Com. Dig. "Pleader" (3. B. 13.).

(*a*) 3. Mod. 134. 1. Ld. Ray. 71. (*b*) 5. Mod. 16. 69. Carth. 367. 890. 1403.

"NOTE,

COWPER AND MILES *againſt* GINGER.

"NOTE, *that one of the defendants is dead:*" and THE CURSITOR made the writ againſt four, without mentioning him who was dead; the queſtion was, whether this was amendable? and adjudged that it was not, becauſe all the parties to the judgment ought to join in a writ of error: it is true, this was a plain miſtake of THE CURSITOR, whoſe inſtructions were right; but yet it ſhall not be amended, becauſe this writ of error was brought to reverſe a judgment; but the ſtatutes for amendment of writs were made for the ſupport of judgments, ſo that writ of error was quaſhed.

And THE COURT now ſaid, that after that writ was quaſhed, the plaintiff in error brought a writ of error *coram vobis reſiden.* wherein the firſt writ of error was miſrecited, it being of a plea *in curiâ noſtrâ*, whereas the ſuit was in the reign of the *King and Queen*, and the writ of error was in the king's time only; for the record was miſrecited, and for that miſrecital the writ of error *coram vobis* was quaſhed (*a*).

(*a*) See the caſe of Ratcliffe *v.* Burtob, Trinity Term, 8. *Geo.* 2. Caſes Temp. Hardres, 135. In point.

Caſe 240.

Andrews *againſt* Paradiſe.

If a man covenant that he will not interrupt the covenantee in the enjoyment of a cloſe; the erection of a gate which intercepts it, is a breach of the covenant, although he had a right to erect it.

ERROR OF A JUDGMENT in the common pleas in an action of covenant, in an indenture to lead the uſes of a fine, wherein the coniſor covenanted that the coniſee ſhould quietly enjoy, &c. and that he would not do any thing to moleſt, hinder, or prevent him (the coniſee) or his wife, or any occupiers of theirs, in the quiet poſſeſſion or enjoyment of the lands, &c. but that the defendant had moleſted him, &c.

The defendant pleaded, that he had done nothing to moleſt, hinder, or prevent the coniſee or his wife, &c.

Cro. Jac. 233.

* [319]

* The plaintiff replied, and aſſigned a breach, for that he was ſeiſed of a cloſe in ſuch a field, being parcel of the lands now purchaſed under his fine and conveyance; and that there was *a lane* leading to this cloſe, through which lane the plaintiff had a way to the cloſe, and that the defendant, *ſcilicet* POSTEA, did erect a gate acroſs that way, *per quod* the plaintiff's tenant was obſtructed in the quiet poſſeſſion and enjoyment of the aforeſaid cloſe, &c.

And upon a demurrer to this replication the plaintiff had judgment in the common pleas.

And now upon this writ of error brought, IT WAS INSISTED, that the judgment ſhould be reverſed.

FIRST, For that the replication was only argumentative of an obſtruction, *viz. per quod* the plaintiff's tenant was obſtructed; whereas the pleading ought to have been certain.

SECONDLY, Nothing appears in this replication to ſhew that the ſetting up the gate was unlawful, for there may be another way, which might make it neceſſary and lawful to ſet up a gate.

THIRDLY,

ANDREWS *againſt* PARADISE.

THIRDLY, That it is not ſet forth where, or to what place this way leads, ſo that the defendant cannot make any anſwer to it, the replication being too general.

8. Rep. 89. 2. Vent. 58.

FOURTHLY, This is not an obſtruction of enjoying the cloſe immediately, but by conſequence; and the plaintiff has not ſhewed that he had a right to enjoy this way.

IT WAS ARGUED *for the affirmance of this judgment*, that the lane was left for the uſe of this cloſe upon the incloſure of a common field, and that it is convenient for the purchaſer, and very neceſſary for preſerving the poſſeſſion; and that this lane was conſtantly uſed by the occupiers of the cloſe before this conveyance and covenant were made, which is not a covenant as to the right, but to ſecure the plaintiff in the quiet poſſeſſion; and the breach being well laid, *viz.* that the defendant obſtructed the quiet enjoyment by ſetting up a gate acroſs the lane, the judgment ought to be affirmed.

THE COURT. This appearing to be a neceſſary way for the enjoyment of this cloſe, then, whether the gate is ſet up by right or wrong, it is not material as to the defendant; for in either caſe, if it be an obſtruction, it ought not to be erected there.

The judgment was affirmed.

The King *againſt* Thead.

Caſe 241.

If a penal ſtatute authoriſe an officer to enter a houſe by day or by night, but if by night in the preſence of a conſtable; it is ſufficient, in a conviction for obſtructing the officer, to ſay he entered *lawfully*; but if it was by night, the defendant may ſhew before the magiſtrate that the entry was without *a conſtable*.

BY the ſtatute 8. *Ann.* c. 9. ſ. 10. for laying certain duties on candles it is enacted, "That all and every the officers for the "ſaid duties ſhall at all times by day or by night, and if in the "night then in the preſence * of a conſtable or other lawful officer "of the peace, be permitted, upon his or their requeſt, to enter "the houſe, melting-houſe, warehouſe, or other place whatſoever "belonging to or uſed by any perſon or perſons who ſhall be a "maker or makers of any candles whatſoever, and by weighing "or tale of the candles, or otherwiſe, as to ſuch officer ſhall ſeem "moſt proper and convenient, to take an account of the juſt "quantity of candles which ſhall have been made by ſuch maker "or makers of candles, from time to time, &c."

And by 8. *Ann.* c. 9. ſ. 11. "All and every ſuch maker and "makers of candles reſpectively are required to keep ſufficient "and juſt ſcales and weights, at the place or places where he, ſhe, "or they do make ſuch candles, and permit and aſſiſt the officer "to make uſe thereof for the purpoſes of this act, under the pe- "nalty of ten pounds, to be forfeited and loſt for not keeping "ſuch ſcales and weights, or for not permitting and aſſiſting the "officer to uſe the ſame as aforeſaid."

* [320]

S. C. 2. Bar. K. B. 16. 73. S.C. 2. Ld. Ray. 1375. S. C. 1. Seſſ. Caſes, 417. 331.

The defendant was convicted upon this ſtatute, for not aſſiſting the officer of exciſe in weighing the candles.

S. C. 1. Stra. 608. S. C. Andr. 84. 1. Salk. 13. 5. Com. Dig. "Pleader" (C. 77.).

THE KING *against* THEAD.

IT WAS NOW OBJECTED, that the conviction was wrong, because the ſtatute directs, that if the entry is in the *night-time*, it muſt be in the preſence of THE CONSTABLE; and it is not ſpecified in this conviction, whether the entry was by night or by day.

REEVE *for the Crown.* It is ſaid in the conviction, that the officer entered *lawfully*, which is ſufficient, without ſhewing any circumſtances of his entry.

THE COURT. This is a good conviction for ten pounds upon an information before the juſtices, for they have a juriſdiction in this caſe, and nothing appears wrong in it; for it being alledged that the officer entered lawfully, it muſt be intended right, eſpecially when nothing appears to make it wrong: this objection ſhould come on the defendant's part by pleading.

And the conviction was affirmed *(a)*.

(a) See Rex v. Thead, 1. Burr. 152.

Caſe 242.

The King *againſt* Edwards and Others.

A conſpiracy by pariſh officers to marry a female pauper ſettled in the pariſh of *A.* to a pauper ſettled in the pariſh of *B.* in order to bring a charge upon the pariſh of *B.* is an indictable offence; but the indictment muſt aver that the parties were *legally ſettled* in their reſpective pariſhes; for ſaying they were *inhabitants* only, is not ſufficient.

THE DEFENDANTS were indicted, for that they, *per conſpirationem inter eos habitam*, gave the huſband money to marry a poor helpleſs woman, who was an inhabitant in the pariſh of *B.* and incapable of marriage, on purpoſe to gain a ſettlement for her in the pariſh of *A.* where the man was ſettled.

IT WAS MOVED to quaſh this indictment, becauſe it is no crime to marry a woman and give her a portion; and the juſtices are not proper judges what woman is capable of a huſband, neither have they any juriſdiction in conſpiracies.

IT WAS INSISTED *on the other ſide*, that there is a crime ſet forth in this indictment, which is a conſpiracy to charge a pariſh, &c. and a conſpiracy to do a lawful act, if it be for a bad end, is a good foundation for an indictment. An indictment for a conſpiracy to charge a man to be the father of a baſtard-child, was held good *(a)*, though fornication is a ſpiritual offence; becauſe the court of king's bench has cognizance of every unlawful act by which damages may enſue. So an information for a conſpiracy to impoveriſh the farmers of the exciſe, was held good *(b)*.

* [321]

* TO WHICH *it was anſwered*, that thoſe were conſpiracies to do unlawful acts; but it was a good act to provide a huſband for this woman.

S. C. 1. Seſſ. Caſes, 336. S. C. 2. Stra. 707. 1. Salk. 174. 2. Ld. Ray. 1167.

THE COURT. The quaſhing indictments is a diſcretionary power of the Court, but in this caſe the defendant has not ſhewed anything to induce the Court to quaſh the indictment; and if the

(a) Temberley v. Child, 1. Sid. 68. S. C. 1. Lev. 62. Rex v. Armſtrong, 2. Vent 304.

(b) Rex v. Starling, 1. Sid. 174.

matter

matter be doubtful, the defendant muſt plead or demur; but indictments for conſpiracies are never quaſhed.—A bare conſpiracy to do a lawful act to an unlawful end, is a crime, though no act be done in conſequence thereof (*a*); but if the fault in the indictment be plain and apparent, it is quaſhed for that reaſon, and the party ſhall not be put to the trouble to plead or demur. Suppoſe there is a conſpiracy to let lands of ten pounds a year value to a poor man, in order to get him a ſettlement, or to make a certificate man a pariſh-officer, or a conſpiracy to ſend a woman big of a baſtard-child into another pariſh to be delivered there, and ſo to charge that pariſh with the child; certainly theſe are crimes *indictable* (*b*). But in this indictment it is not ſet forth, that the woman was likely to be chargeable to the pariſh. As to the objection, that the ſeſſions have no juriſdiction in *conſpiracy*, the contrary is true; they have no juriſdiction in *perjury* at *common law*, but by *the ſtatute* they have; and they have no juriſdiction to indict for forgery, but certainly they have juriſdiction *de conſpirationibus* (*c*), and ſuch a perſon as this defendant is, was puniſhed by indictment at common law (*d*).

Finch. 80. cap. 15.

But in the *Trinity Term* following judgment was given for the defendant, becauſe it was not averred in the indictment, that the woman was laſt legally ſettled in the pariſh of *B.* but only that ſhe was an inhabitant there.

(*a*) Reg. *v.* Beſt, 2. Ld. Ray. 1167. S. C. 6. Mod. 185.

(*b*) It is alſo ſaid, that the Court will grant *an information* againſt *overſeers* for this offence, Rex *v.* Sadler, Sayer, 260. Rex *v.* Tarrant, 4. Burr. 2106. But the Court has come to a reſolution not to grant informations in theſe caſes, Eaſter Term 25. *Geo.* 3. and therefore it was refuſed againſt the overſeers and inhabitants of *Doncaſter*, for conſpiring to prevail on a ſoldier to marry a poor woman of their pariſh then big with child, for the purpoſe of throwing the burthen of maintaining her on another pariſh, Rex *v.* Compton, Cald. 246. It has alſo been refuſed in a very groſs caſe, that of a man under dureſs married to an ideot, Rex *v.* Upſdale, Mich. 28. *Geo.* 3. Cald. 247. *notis.* But if perſons concurring in ſuch a conſpiracy are of good circumſtances, and in reſponſible ſituations, the Court will grant *an information*, otherwiſe the injured parties muſt reſort to the ordinary method of *indictment*, Cald. 247.

(*c*) Rex *v.* Riſpal, 3. Burr. 1320.

(*d*) It is ſaid, S. C. 1. Seſſ. Caſes, 336, that the Court left the defendants to demur or plead to it, as they ſhould think fit; and S. C. 1. Stra. 707. that on *a demurrer* to this indictment, judgment was given for the defendant, becauſe it is not an offence indictable.

Sir John Walrond *againſt* Jacob Senior Henricus Van Moſes.

Caſe 243.

A MOTION was made for leave to change the bail in this cauſe, on the very day that it was to be tried by *niſi prius*, becauſe one of them was a very material witneſs for the defendant.

One of the bail was a material witneſs for the defendant, and therefore he moved that new bail might be put in, but it was denied.

THE COUNSEL *for the plaintiff* objected againſt it, *viz.* that the bail ſhould not be changed, becauſe the principal was run away, and the bail had offered a hundred pounds reward to any perſon who ſhould bring him in; beſides, the new bail now offered inſtead

Sir John Walrond *againſt* Jacob Senior Henricus Van Moses.

inſtead of the former, were bail to an * action upon a *South-Sea* contract, in which the plaintiff had a verdict for thirteen thouſand four hundred pounds, ſo the plaintiff in this action cannot tell what they may be worth after the payment of that ſum.

The Court. If the bail ſurrender the principal, they ſhall be admitted to put in new bail, and then the old bail may give evidence at the trial; but the bail now offered being bail in another action for a conſiderable ſum, and a verdict againſt the principal, the plaintiff in this action cannot have timely notice to inquire into their circumſtances; therefore the Court will not force new bail to the action, but the old ones muſt ſtand.

* * * * * * * *

Trover will lie here for a converſion in *Ireland*.

Nota, At the trial of this cauſe, a caſe was cited, That *trover* lay in *England* for timber taken away and converted in *Ireland*; and this was by the opinion of the late *Chief Juſtice* Holt, though it was objected, that it might bring the title of lands in *Ireland* in queſtion, which could not be tried here; but he anſwered, that as *trover* is a tranſitory action, it might be brought here for a converſion in *Ireland*; nor ſhall any incident queſtion which may ariſe on the ſame bar the plaintiff of ſuch action, for if it ſhould, then a perſon being in *England* can have no remedy here when the defendant is guilty of a *trover* in *Ireland*, and comes from thence into this kingdom.

All which was now offered in anſwer to a queſtion made, whether an action lay here on a contract made in *Holland*; and the caſe of *Brown v. Hodges* (*a*) was cited, which was, *Trover* brought here, and upon *not guilty* pleaded, it appeared, that the defendant was tenant by the curteſy in *Ireland*, and had cut down trees there, and that the reverſion belonged to the plaintiff; and upon a caſe made for the opinion of the Court, it was reſolved, that in all local actions, as in treſpaſs *quare clauſum fregit*, the plaintiff cannot prove a treſpaſs anywhere elſe, but where it is laid in the declaration, nor lay it in any other place but where it was done; but that it was otherwiſe in tranſitory actions, as *trover*, *&c.* therefore the plaintiff might lay the converſion here, and prove it was done in *Ireland*.

See Doulſon *v.* Mathews, 4. Term Rep. 503.

* * * * * * * *

Copy of an agreement in *Holland*, if atteſted by a Notary, is good evidence in *England*.

Nota also, That in the principal caſe it was now reſolved, that a copy of an agreement regiſtered in *Holland*, and atteſted by a public notary there, may be given in evidence for the now defendant, eſpecially ſince he proved that the plaintiff took out another copy of the ſame agreement, and would not now produce it; therefore that copy which the defendant had taken out was given in evidence, for it is plain that * the plaintiff knew the agreement, he having taken a copy thereof, ſo could not be ſurprized.

* [323]

(*a*) Salk. 290. pl. 29.

Nota

NOTA ALSO, That at the ſame time the Court held, that a plaintiff who was in *Holland* might make affidavit there, and get it atteſted by a public notary; and that it ſhould be admitted as evidence to hold the defendant to ſpecial bail here.

Sir JOHN WALAGNE *againſt* JACOB SENIOR HENRICUS VAN MOSES.

Warren *againſt* Conſett. Caſe 244.

THIS was a writ of error on a judgment in the common pleas, in an action of debt for a penalty in not performing an agreement, to receive and pay ſo much for a transfer of ſtock, &c.

"*Nil debet*" is no good plea to an action of debt on a penalty. S. C. ante, 106. S. C. poſt. 382. S. C. 2. Stra. 778. S. C. 2. Ld. Ray. 1500. S. C. Prac. Reg. 306. S. C. 1. Bar. 15.

The defendant pleaded *nil debet*; to which plea the plaintiff demurred and had judgment, for that *nil debet* was no good plea; and that being now the only queſtion,

It was argued by REEVE *for the plaintiff in error*, that the plea was good. It is true, it is not ſo in an action of debt on a bond, becauſe the debt is immediately due; but it is otherwiſe in an action for a penalty, becauſe the plaintiff could not demand it as a debt or duty; for it is not ſo without laying ſome fact antecedent to his demand, to entitle himſelf to this action; and that muſt be ſomething *debors* the deed to ſupport the demand; for there is a difference between a bond for performance of articles, where the condition appears in the very body of the bond, and an obligation which has a defeaſance or condition in it not in the body of the obligation; for in this laſt caſe a man may have an action on the obligation, without ſetting forth any matter *debors* to entitle him thereunto; and in ſuch caſe *nil debet* is no good plea, for the obligation muſt be avoided by matter of as high a nature, and the defendant is *eſtopped* by the deed to ſay nothing is due; but it is otherwiſe in the firſt caſe, for there the debt is not due *primâ facie* on the deed, but for not doing ſome other collateral act.

The caſes following were cited to ſhew this to be the conſtant difference, *viz.* that wherever the debt ariſes by matter collateral to the lien, it is a good plea; becauſe there ariſes no eſtoppel by the deed. When matter of fact and record are mixed, the party is not bound to plead *nul tiel record*, in an action of debt againſt a ſheriff or gaoler, for an eſcape of one in execution (*a*); though the plaintiff muſt declare on the judgment, *nil debet* is a good plea, and ſo it is to an action of debt on the ſtatute 2. *Edw.* 6. for not ſetting out tithes (*b*); and ſo it is to an action of debt on * a judgment againſt an executor upon ſuggeſting a *devaſtavit* (*c*), becauſe the *devaſtavit* is a matter *en pais* triable: ſo ſaid by HOLT, *Chief Juſtice*, in the caſe of *Barrett v. Andrews* (*d*).

11. *Hen.* 7. 4. b. 21. *Hen.* 7. 14. 45 *Edw.* 3. 4. b. 46. *Edw* 3. 1. b. Broke, Iſſue joined, 23. 5 Com. Dig. "Pleader" (2. W. 16.)

* [324]

Hut. 109. Hob 224. Lev. 170. 2. Mod. Rep. 347.

IT WAS AGREED *on the other ſide*, that *nil debet* is a good plea where the action is founded on a collateral matter, and not compriſed in the deed; and theſe are caſes of daily experience; as in

(*a*) 1. Saund. 38.
(*b*) Cro. Car. 513.
(*c*) Hutton, 109.
(*d*)

WARREN *againſt* CONSETT.

actions of debt for rent reſerved on a leaſe by deed; and in actions of eſcape, and in all acts founded on acts of parliament. But the action in the principal caſe is entirely depending on the deed, and abſolutely founded on the obligation therein, by which the defendant bound himſelf in ſuch a penalty, which is an obligation to all intents and purpoſes; but where the lien ariſes on the deed itſelf, there *nil debet* is no good plea, though matter of fact be averred; and wherever an action of debt is brought on an obligation for payment of money, it muſt be averred that the debt is not paid, which is matter of fact; and yet in ſuch caſe *nil debet* is no good plea. But wherever the plaintiff declares on a fact collateral unto, and not ariſing within the deed, there it is a good plea; but it is a general rule, that *nil debet* is no good plea to any action founded on a ſpecialty or on a record; and it would be of very ill conſequence if it ſhould, and particularly in this caſe; for then the plaintiff muſt not only prove that this deed was executed, but he muſt alſo prove the time of the opening the books, the regiſtring the contract, the tender made by him to transfer, and the refuſal of the defendant to accept, &c. and to pay the money; and after all this hardſhip, if *nil debet* ſhould be a good plea to a ſpecialty, for ſo this obligation is, the defendant may ſurprize the plaintiff by giving a releaſe in evidence, or by proving the obligor was not *compos mentis* at the time of making this obligation; and ſuch difficulties might make perſons defend their cauſes where there is no colour of defence, but only ſome hopes that the plaintiff might fail in proving ſome of thoſe things; therefore the law will not admit of ſuch complicated iſſues, but will always have the iſſue a ſingle point if poſſible, and for that very reaſon will never permit a man to plead the general iſſue to a ſpecialty: beſides the vaſt difference this iſſue may make of coſts at the trial, which probably may be ſwoln from ten pounds (which might be competent coſts upon *non eſt factum*) to a hundred pounds upon ſuch a complicated iſſue as *nil debet*, this plea contradicts the deed, and therefore ought not to be allowed more than *nil habuit in tenementis* in an action of * debt for rent reſerved upon an indenture; which was never yet allowed.

2. Sand. 344. Hard 332. Salk. 565. pl. Keilw. 47.

*[325]

TO WHICH *it was anſwered*, that though there be ſome ingenuity to affirm, that where the facts on which an action is founded are continued, and appear in the deed itſelf, there *nil debet* is no good plea, yet a bare affirmation without any one authority to ſupport it, will be of no force.

THE COURT took time to give judgment, becauſe the court of common pleas were unanimous in their judgment (*a*).

(*a*) See poſt. 385.

The

The King *againſt* Simpſon.

Caſe 245.

Monday, 16 *November*, 1725.

Mandamus to ſwear a church-warden; the ſurrogate made an ill return.

MANDAMUS to the defendant, who was ſurrogate to *Dr. King*, archdeacon of the dioceſe of *London*, to ſwear one *Fane* church-warden of *Colcheſter*, being elected by the inhabitants according to the cuſtom of that pariſh.

S. C. 2. Ld. Ray. 1379. S. C. 1. Stra. 609. 1. Ld. Ray. 138. 5. Mod. 325. 1. Bar. K. B. 381. 3. Burr. 1420.

The defendant returned, that it did not appear to him *per aliquod ſcriptum* that *Fane* was duly elected (*a*); and that the *Biſhop of London* had inhibited *Dr. King*, and any perſon acting under him, to ſwear this *Fane*; ſo he (the ſurrogate) cannot ſwear him.

MR. REEVE excepted, that the return did not ſet forth that *Colcheſter* was within the dioceſe of *London*.

TO WHICH *it was anſwered*, that though the return to the *mandamus* do not preciſely mention *Colcheſter* to be within the dioceſe of *London*, yet when it mentions that the *Biſhop of London* had inhibited the *Archdeacon*, *&c.* that is ſufficient to ſhew the Court that it was within his dioceſe.

A *peremptory mandamus* was granted, as it was in the caſe of *The King v. Cardigan*; for the Court ſaid, that where the church-wardens are to be elected by the pariſhioners by preſcription, it ſhall not be in the power of the parſon to hinder them.

(*a*) See Rex v. Dr. Harris, 3. Burr. 1421.

The King *againſt* White.

Caſe 246.

"*Non fuit electus*" no good return to a *mandamus* to ſwear a church-warden.

A MANDAMUS was directed to an archdeacon to ſwear a church-warden, who was elected by the inhabitants, &c.

He returned *non fuit electus*.

THIS WAS ADJUDGED to be no good return (*a*).

2. Ld. Ray. 1379. 2. Stra. 894. 2. Salk. 434.

And a *peremptory mandamus* was granted (*b*).

(*a*) But Ld. Raymond ſays that this determination was certainly wrong, for the return was a good return, and hath often been made to ſuch *mandamus*, and actions brought upon the return and tried. 2. Ld. Raym. 1379, 1380. 1405. 11. Mod. 174. pl. 16. 12. Mod. 3. That *non fuit electus* was not a good return, was denied, for the Court ſaid, that caſe had been over-ruled, and they hoped never to hear it cited again. Fitzgib. 195. 2. Stra. 895. Barnard K. B. 412.—NOTE *to the former edition.*

(*b*) Burr. 1328.

Anonymous.

Caſe 247.

Seamen who are witneſſes, and going a long voyage, cannot be examined at a Judge's chamber.

A MOTION was made by the plaintiff to examine witneſſes at a Judge's chamber, they being mariners, and now going to ſea on a long voyage.

ANONYMOUS.

THIS WAS OPPOSED *on* * *the other ſide*, becauſe this would be to deprive the party of the benefit of their evidence by croſs-examining them at the trial. It is true, ſuch motions have been made where the defendant would put off a trial, or where he deſires ſome other favour of the Court; but here it is in the power of the plaintiff to bring on the trial when he pleaſes; and the defendant cannot bring it on but by *proviſo*, and then this motion might be proper,

THE COURT. This motion would have been granted if the defendant had agreed to it; or if he had deſired any favour of the Court, it ſhould not be granted, unleſs he would admit the plaintiff to examine his witneſſes. But that being not this caſe,

The plaintiff took nothing by this motion.

Caſe 248.

The King *againſt* Edwards.

An information lies againſt overſeers of the poor, for removing a ſick perſon.

2. Show. 75. 4. Com. Dig. "Indictment" (D.).

UPON A MOTION for AN INFORMATION againſt the overſeers of the poor of the pariſh of *Wadhurſt*, for removing a poor woman who had the ſmall-pox into another pariſh, and againſt her will, from the pariſh of *Wadhurſt*, where ſhe was an inhabitant; and the ſeſſions refuſing to give any relief;

THE CHIEF JUSTICE ſaid, that where a perſon is viſited with ſickneſs by the act of God, he ought not to be removed from the place where he is ſick, farther to endanger his health, without an order of two juſtices; and if ſuch order be made by the juſtices, knowing him to be ſick, AN INFORMATION ſhall go againſt them.

Thereupon a rule was made againſt the overſeers to ſhew cauſe, &c.

And on another day they came to ſhew cauſe, &c. and denied the fact alledged againſt them;

And moved, that the rule might be diſcharged, for otherwiſe this woman, who was really ſettled in that pariſh to which ſhe was removed, would, upon the trial of this information, be evidence againſt the pariſh of *Wadhurſt*, and gain a ſettlement there.

But THE COURT was of opinion, that the fact being controverted, and carrying ſuch a barbarity with it, it was requiſite that it ſhould be tried upon AN INFORMATION; and then the jury would be proper judges of the truth.

* [327]

Caſe 249.

* The King *againſt* Harris.

An indictment for aſſaulting "*J. S. pett. con'bular.* in the execution of his office," is good.—4. Co. 41. 5. Co. 121. Cro. Car. 464. 4. Com. Dig. "Indictment" (G. 5.).

INDICTMENT FOR A RIOT, at *Hereford* aſſizes, and aſſaulting *J. S. pett. con'bular. in executione officii.*

IT WAS OBJECTED, upon a motion to quaſh it, that this indictment was ill, becauſe it was for a riot *in et ſuper pett. con'bularium*, when there is no ſuch word as *pett.* THE KING *againſt* HARRIS.

This was granted on the other ſide, but that *con'bularium*, with *a daſh*, made the indictment good.

THE COURT. The word "*pett.*" is ſurpluſage, and ſhall therefore be rejected; and the indictment is good without it, for the other word makes it good: for *con'bularium*, by virtue of the *daſh*, may ſtand for *conſtabular'*: ſuch daſhes have been often uſed, and the common uſe is the only rule in governing our conſtruction of them.

The indictment was held good (*a*).

(*a*) N. B. As the law proceedings are now in *Engliſh*, this caſe can never happen again. See ſtat. 4. *Geo.* 2. c. 26. 5. *Geo.* 2. c. 27. 6. *Geo.* 2. c. 6.—NOTE *to former edition.*

Hunſton *againſt* Howard. Caſe 250.

THE PLAINTIFF had judgment in the court of common pleas, which was now above ten years ſtanding, when the defendant brought a writ of error in the court of king's bench, and aſſigned the want of an original for error; and now the defendant in error pleaded "*in nullo eſt erratum*;" and the want of an original being not yet certified, Want of an original aſſigned for error.

He moved to put it off until the next Term, that he might in the mean time procure an original to be filed, this being a contrivance of his own attorney to defraud him.

THE COURT. This motion ſhould have been made before the cauſe was put in the paper.

But it having the countenance of fraud, IT WAS RULED to go over upon payment of the coſts of the day.

Cuband *againſt* Dewſbury. Caſe 251.

PROHIBITION. The caſe was thus: The plaintiff in the prohibition procured A WILL to be delivered to him out of the prerogative court of *York*, and at the ſame time entered into a bond in ſuch a penalty, &c. with a condition to re-deliver it again into that court, at or before ſuch a day, &c.; which not being done, THE SPIRITUAL COURT proceeded againſt him *pro laſione fidei*, and to have the very WILL brought into court. If a perſon procure A WILL to be delivered to him out of the prerogative court, and give *a bond* to re-deliver it into the court on ſuch a day, THE SPIRITUAL COURT cannot proceed againſt him for a *breach of his faith*, if he do not redeliver it; for they may proceed upon *the bond* in the temporal courts.—2. Roll. Abr. 283. 2. Inſt. 493. F. N. B. 43. 6. Com. Dig. "Prohibition" (G. 13.).

The defendant pleaded, that he had entered into a bond to redeliver the will, on which they might have a proper remedy:

which

CUBAND *against* DEWSBURY.

* which plea being rejected by that court, they proceeded againſt him there.

And now he moved for *a prohibition*, upon a ſuggeſtion that all ſuits upon or concerning bonds are determinable only at common law.

BOOTLE *contra*. This motion comes too late, there being a ſentence and excommunication. The intent of the libel plainly appears to be for a re-delivery of the WILL, and not for the recovery of the penalty of the bond; for the witneſs to the bond was dead, and probably if it was put in ſuit they might not recover; beſides, the penalty might not be ſufficient to make amends for the damages ſuſtained by thoſe who were intereſted in the lands conveyed by this will, by not having it produced; therefore it is neceſſary that they ſhould have a power to enforce him to bring it in. Beſides, it is the election of the party either to put the bond in ſuit, or to ſue in the ſpiritual court *(a)*; and now ſome inſtances were ſhewed in parallel caſes. A man forged AN ORDINATION *(b)*, and being proſecuted in the ſpiritual court, he pleaded, that *forgery* was triable at common law; the Court rejected that plea; and thereupon the plaintiff moved for a prohibition, but it was denied, becauſe the proſecution was in order to a deprivation. So where the ſuit was in the ſpiritual court for taking the bells out of the ſteeple *(c)*, the defendant pleaded the general pardon; and that plea being likewiſe rejected, the plaintiff moved for a prohibition, and that was denied, becauſe the ſuit being *pro ſalute animæ* was not pardoned *(d)*. And in *Gardner's Caſe (e)*, where the executors gave bond for payment of a legacy, DODERIDGE, *Juſtice*, was of opinion, that the obligee might ſue for the legacy in the ſpiritual court, or at common law upon the bond; for that the taking the bond had not altered the nature of the legacy.

THE COURT. That caſe in 2. *Roll. Rep.* 160. is not law; for the bond ſatisfies the party by extinguiſhing the legacy *(f)*.

Adjournatur,

(*a*) Cro. Eliz. 607. 844.
(*b*) 1. Lev. 131. 1. Sid. 217.
(*c*) 1. Sid. 281.
(*d*) W. Jones, 230.
(*e*) 2. Roll. Rep. 160.
(*f*) Yelv. 39.

Caſe 252.

The King *againſt* Brereton.

An information for a libel laid in the *city* of *Cheſter* ſhall be tried in the county of the city by THE MAYOR.

AN information for a libel was laid in the city of *Cheſter*, which being a local offence, and iſſue being joined in this court, could not be tried there, but in *the county* of *the city*; therefore it was ſent by *mittimus* directed to "THE CHAMBERLAIN of the county "palatine of *Cheſter*," with direction, that he ſhould tranſmit it to "the mayor of the city of *Cheſter*," in order to have it tried in the county of the city before him. * The chamberlain accordingly tranſmitted the record to the mayor, who had the cauſe tried, and a verdict was given againſt the defendant; and then the mayor, who

* [329]

who was the judge of the court, returned the record, which return was certified by the chamberlain (*a*). THE KING *againſt* BARNARDISTON.

FAZAKERLY now moved in arreſt of judgment.

THE FIRST EXCEPTION was, that it appears by the record that the day is appointed by THE MAYOR; which is therefore void, becauſe done without authority.

SIR PHILIP YORKE, *Attorney-General*, on the other ſide.

The mayor, being judge, has a right to appoint the day; all the precedents warrant it. Beſides, ſhould this objection prevail, we may have a new *mittimus*, or a *venire facias de novo* (*b*). And this record is well returned, and the day given by the mayor (who was the judge that tried the cauſe), to hear the judgment of this Court; and if no day had been appointed on the roll, the Court might appoint a day in entering the continuances until a plea or demurrer. 1. Roll. 485.

THE COURT. If the precedents are ſo we cannot vary now; the city is part of the county-palatine.

THE SECOND EXCEPTION was, that it does not appear that the chamberlain of the county-palatine of *Cheſter* is chamberlain of the city of *Cheſter*. A return made by *a chamberlain* of a city ſhall be intended made with proper authority.

SIR PHILIP YORKE *anſwered*, The chamberlain of the county-palatine is chamberlain of the city of *Cheſter*, for the city of *Cheſter* is part of the county-palatine; and he has juriſdiction within the city of *Cheſter*, by 33. *Hen.* 8. c. 13. (*c*). There are but two precedents of actions laid in the county of the city of *Cheſter*; and in both theſe precedents the *mandamus* is directed as here (*d*).

THIS COURT will take judicial notice of the miniſterial officers of all counties; * and if THE CHAMBERLAIN has a command over the whole county-palatine, as certainly he has, the Court will intend, that this return was made by him as chamberlain of the county-palatine, and no other ſhall be intended. * [330] 4. Inſt. 212.

THE THIRD EXCEPTION was, that the fact is laid very uncertain, for it is, that the defendant "*ſcripſit, fecit, et publicavit, ſeu ſcribi fecit, et publicari cauſavit*," which is very uncertain, and no proper defence can be made, becauſe it is in the disjunctive; therefore where an indictment was "for making, or cauſing to be "made, a bill of lading, it was held ill, becauſe in the disjunctive (*a*). An information for *a libel* in the disjunctive, "that he wrote "or cauſed to "be written," is bad. 2 Roll. Abr. 81. pl. 5.

(*a*) The writ from THE CHAMBERLAIN to THE MAYOR after iſſue tried commands THE MAYOR to ſend the record back to THE CHAMBERLAIN for him to appoint a day for the appearance of the parties, in order for their receiving judgment.—NOTE *to the former edition.*

(*b*) 1. Roll. Abr. 285. pl. 4.

(*c*) Co. Lit. 211.

(*d*) Trinity Term, 13. *Will.* 3. Merchant-Taylors Company *v.* Baynton. Michaelmas Term, 8. *Anne*, Henſhaw *v.* Tickel.

SIR

THE KING *againſt* BEARETON.

SIR PHILIP YORKE *anſwered*, that it is true, a man ought not to be puniſhed where there is any uncertainty in the crime committed; but a disjunctive does not always make a different crime, but ſometimes it is explanatory *(b)*; and therefore writing a libel, or cauſing it to be writ, is the ſame offence; and if ſo, this information is good; it is like an indictment on the ſtatute 5. *Eliz.* c. 4. that a man exerciſed *artem* SIVE *myſterium*, and that was held no fault. There is no uncertainty in the fact, for "to "write or cauſe to be written" is the ſame offence.

THE COURT. "Writing" and "cauſing to be wrote" are two different acts; there is no information like this. An indictment for erecting *cottagium* SIVE *tenementum* is ill. As to the indictment on 5. *Eliz.* c. 4. it is good, becauſe that is not the charge. If the crimes were the ſame, yet the indictment ought to be certain.

It is not neceſſary to ſet out the whole *pamphlet* in an information for *a libel.*

THE FOURTH EXCEPTION was, that the information ſets forth, that the defendant made "*quendam libellum in quo conti-* "*nentur hæc ſcandaloſa verba, &c.*" ſetting forth ſome words, but not the whole pamphlet, which he ſhould have done, or averred that there were no words in it to qualify thoſe which were uncertain.

SIR PHILIP YORKE. As to ſetting forth the whole libel, or the contents thereof, it is not material ſo to do; for if it ſhould, moſt informations would be ſet aſide for that reaſon. All precedents warrant this form of ſetting out the libel; for if there be any other part of the libel which may excuſe the defendant, he may take advantage thereof upon the trial.

THE COURT. The information is good, notwithſtanding this exception.

Adjournatur.

(*a*) An indictment for a forcible entry into "two cloſes of meadow *or* paſture," is void for uncertainty.—5. Mod. 137. Salk. 342. 371.

(*b*) Moor, 813.

(*c*) See Baldwin *v.* Elphinſtone, 2. Black. Rep. 1037.

Caſe 253.

Sparks *againſt* Keeble.

In treſpaſs for taking and deſtroying hop-poles; A PLEA of *liberum tenementum*, and that they were taken *damage feaſant*, without anſwering the deſtruction, is bad.—S. C. Forteſ. 378. 4. Co. 62. Cro. Eliz. 268. 434 Cro. Jac. 27. 1. Lev. 16. 2. Leon 195. 2. Vent. 193. 5. Com. Dig. "Pleader" (E. 1.).

TRESPASS *quare vi et armis clauſum fregit et intravit, &c.* and took away the plaintiff's hops, and deſtroyed his hop-poles, &c.

The defendant, as to the *force and arms*, pleaded *not guilty*, and juſtified the entry, for that the place WHERE the treſpaſs was ſuppoſed to be done was his (the defendant's) own ground, and that he entered and diſtrained the poles *damage feaſant.*

And

And upon a demurrer to this plea,

SPARKE *againſt* KEEBLE.

IT WAS INSISTED *for the plaintiff*, that though the defendant might diſtrain the poles, yet he could not deſtroy them; and in this plea he made no anſwer to the deſtroying them, as he ought.

THE COURT. No juſtification can be good for deſtroying a thing diſtrained, for all diſtreſſes ought to be ſafely kept; ſo the defendant having not anſwered that part of the declaration, JUDGMENT muſt be for the plaintiff.

* Arthur *againſt* Commiſſioners of Sewers in Yorkſhire. Caſe 254.

A writ of *certiorari* lies to *commiſſioners of ſewers* to remove an order made by them for the removal of their clerk; and if the return is quaſhed, a ſecond *certiorari* ſhall iſſue.

S. C. Forteſ. 374. S. C. Stra. 609. 1. Vent. 67. 1. Lev. 288. 1. Mod. 44. Bunb. 61. Stra. 1263.

THE PLAINTIFF was choſen clerk to the commiſſioners of ſewers at a meeting, by a majority of forty-three then preſent; and afterwards, at a ſecond meeting, they made an order to turn him out, and they choſe another.

The plaintiff now moved for a *certiorari* to have the order returned.

This was oppoſed by the commiſſioners, who offered to read affidavits that the plaintiff was ſurreptitiouſly choſen without due notice given to the majority of the commiſſioners, who formerly made an order, that the commiſſioners ſhould always give thirty days notice of every meeting; but when this clerk was choſen there were but ſix days notice given, on purpoſe to ſurprize the reſt of the commiſſioners in the choice of the plaintiff, for great part of the commiſſioners could not poſſibly be there.

ON THE OTHER SIDE it was ſaid *for the plaintiff*, that the Court would not inquire into the merits of his election until a *certiorari* was granted and returned; for ſince the commiſſioners have power by the ſtatute to elect a clerk, and the plaintiff is elected by them, he is entitled to ſeveral perquiſites by virtue of ſuch election; and the commiſſioners having thereby executed their power, they ſhall not be permitted to recall their own act, for if they ſhould, they might chuſe a new clerk at every meeting, and turn out the other, and there will be ſuch a conteſt amongſt them as may render the office precarious.

And for this reaſon THE COURT would not permit the affidavits to be read, but would grant a *certiorari*, which was a *writ of right*.

But this was denied by ONE OF THE JUDGES, who ſaid, that a *certiorari* was not a *writ of right*, for if it was it could never be denied to grant it; but it has often been denied by this Court, who, upon conſideration of the circumſtances of caſes, may deny it or grant it at diſcretion; ſo that it is not always a writ of right. It is true, where a man is choſen into an office or place, by virtue whereof he has a temporal right, and is deprived thereof by an inferior juriſdiction, who proceed in a ſummary way, in ſuch caſe he is entitled to a *certiorari ex debito juſtitiæ*, becauſe he has no other remedy, being bound by the judgment of the inferior judicature.

The

ARTHUR *against* COMMISSIONERS OF SEWERS IN YORKSHIRE.

* The writ of *certiorari* was granted (*a*).

But the return thereof was quaſhed for ſome irregularity; and thereupon the Court was moved for another *certiorari*.

ONE OF THE JUDGES oppoſed the granting it, becauſe the removal of the orders by virtue of the *certiorari* would not determine the right of the plaintiff, which was the reaſon of quaſhing the return of the former *certiorari*.

But by THE OTHER THREE JUDGES the *certiorari* was granted.

(*a*) It is ſaid, 8. C. 1. Strange, 609. that THE COURT held, that a *certiorari* to bring up an order made by commiſſioners of ſewers for the removal of their own clerk was of *common right*, and not *diſcretionary*, as in the caſe of other orders, where great inconveniencies may follow by inundations in the mean time.

Caſe 255. The King *againſt* Serle.

Mandamus to ſwear a mayor, &c. Ante, 234.

MANDAMUS to the defendant, late mayor of *Penryn*, in *Cornwall*, to ſwear *Peter Pindar* mayor, he being duly elected.

6. Com. Dig. "Quo Warranto" (C. 5.).

The defendant made this return, *viz.* that this town was incorporated by letters patent made by king *James the Second*, and to conſiſt of a mayor, and ſo many burgeſſes; that they were to chuſe a mayor every year out of the capital burgeſſes, who is to act as mayor for a year, and until another was duly choſen; that on *St. Matthew's Day* (being the day appointed by the charter, and in ſuch a year, one *Penhallor* was choſen and ſworn mayor, and died within the year; that after his death the corporation proceeded to a new election, according to their power ſo to do, by virtue of the letters patent, who choſe the now plaintiff mayor, who for ſome time acted under this election; that afterwards an information in nature of a *quo warranto* was brought againſt him, for uſurping this office of mayor, "*prout patet per eandem*," inſtead of "*prout* "*patet per recordum*," and that he juſtified by virtue of the ſaid election; on which juſtification two iſſues were tried: the firſt was, whether the plaintiff was duly elected mayor; the ſecond was, whether he was duly ſworn into the office; and the firſt iſſue was found for him, and the ſecond againſt him; and thereupon a general judgment of amotion or *ouſter* was given againſt him, VIZ. "*quòd* PETRUS PINDAR *nullo modò ſe intromittat, &c. ſed ab* "*iiſdem et eorum quolibet penitus excludetur et amovetur*," but does not ſay, that this judgment was given upon this information.

And now he moved for a *mandamus*.

The defendant pleaded this judgment of *ouſter* againſt granting that writ.

IT WAS INSISTED *for the granting it*, that though the judgment of *ouſter* was entered againſt him, yet as his right to be mayor was by virtue of his election, and the right of exerciſing that

* that office was by virtue of his being ſworn, ſo the judgment againſt him for uſurping the office, not being duly ſworn, can be no bar to his exerciſing it when he is duly ſworn. The judgment in this caſe is like where ſeveral iſſues are tried, and ſome found for the plaintiff, and ſome for the defendant. It is true, in ſuch caſe the Court will give leave to enter judgment for the plaintiff; but they will likewiſe give the defendant leave to take advantage of the iſſues found for him, as they appear in the ſame record. This may be compared to an attainder where the heir or executor of the perſon attainted brings a writ of error, though in ſuch caſe he can neither have executor or heir, yet the attainder cannot be pleaded in bar to the writ, for *non valet exceptio ejuſdem rei cujus petitur diſſolutio*; ſo in the preſent caſe, to return a judgment of *ouſter* for not being ſworn as a cauſe why the plaintiff ſhould not now be ſworn, is as much as to ſay you are not ſworn, therefore you ſhall never be ſworn, becauſe you exerciſed this office before you was ſworn. It may likewiſe be compared to a deed of feoffment, where the feoffee enters before livery and ſeiſin made by the attorney who was to make it, he (the attorney) ſhall never ſay, that he is not obliged to make livery, becauſe the feoffee entered before it was made. It is true, the plaintiff was not duly ſworn at the time he was elected; but if he could not be ſworn afterwards, then the charter would be loſt, becauſe he is not mayor, not being ſworn, and there is no mayor to act in the mean time. If a ſpecial information ſhould iſſue againſt this mayor for not being ſworn, and he is found guilty, certainly he might be ſworn afterwards, which is the ſame caſe as appears on this record; and moſt of the caſes of this nature are for mal-feaſances after elections. It is to be conſidered, that there is a writ of *quo warranto clamat, &c.* and an information in nature of a *quo warranto*, as in this caſe, that the judgment in the one is final, it being a civil ſuit, and the king's writ of right; but it is not final in an information in nature of a *quo warranto*; but if it was ſo generally, yet it could not be ſo in this caſe, becauſe the plaintiff's right appears in the ſame record; therefore a general judgment of *ouſter* ought not to be entered, but it ſhould be with a *ſalvo jure*, as in the king's caſe, when judgment is given againſt him in a *quo warranto*. It is true, where the judgment is for the king againſt the * very liberty claimed, and this upon an information in nature of a *quo warranto*, there it is final. But in the preſent caſe, the right of the plaintiff appears on the very face of the record; therefore though the non-ſwearing may be a good return for not admitting the plaintiff to act, if he ſhould bring a *mandamus* for that purpoſe, and to have the *inſignia* of the office delivered to him, yet it cannot be a good return to this *mandamus*, which is only to ſwear him. It is true, he has already exerciſed the office of mayor, but that may be compared to the caſe of a copyholder who enters before admittance, yet he may be admitted afterwards. It is likewiſe true, that a *mandamus* has been denied to ſwear a mayor after the *(a)* year; but that was

THE KING *againſt* SERLE.

2. Salk. 432. pl. 11.

Co. Ent. 549. 2. Inſt. 282.

* [334]

Cro. Jac. 160. Yel. 190.

1. Inſt. 56.

(a) Sid. 33.

where

THE KING against SEALE.

where he had no right to hold over, and therefore could not be ſworn where his right was determined; which is not this caſe; for here was a power by the charter to hold over; therefore the judgment of *ouſter* (though entered generally) ſhould be conſidered as a judgment *quouſque*; for the *ouſting* a man from a liberty, or the ſeizing thereof, is quite different from the ouſting one from the officiating in an office. Beſides, *a mandamus* gives no right, but puts a man into poſſeſſion, which may be afterwards diſputed by every man who has a right; and therefore a *peremptory mandamus* was deſired.

IT WAS ARGUED *for the defendant*, that all the right of the plaintiff muſt be loſt by this general judgment of *ouſter*; and in this caſe the election and ſwearing being but one entire juſtification, and one of them being found againſt the plaintiff, judgment final ſhall be given againſt him, and he ſhall not afterwards be admitted to claim any right by virtue of an election precedent to ſuch judgment, becauſe that judgment has extinguiſhed all his right. Now the judgments, both in the writ of *quo warranto*, and in the information in nature of a *quo warranto*, are the ſame, which appears in ſeveral entries; and they differ only where the party is ouſted from the franchiſe, and where it is ſeized by the king; for where it is entered with a *ſalvo jure*, there the judgment muſt be againſt the king. So, unleſs the plaintiff can ſhew ſome new title, he has no right to be ſworn, nor can he be ſworn by virtue of any right he claims by the former election, becauſe all that right is determined by this judgment.

2 Roll. Rep. 46. 92. Raſt. Ent. 540. Co. Ent. 527. 537. 540. 559.

THE COURT. The queſtion is, Whether *Peter Pindar* has ſtill a ſubſiſting right to enjoy the office of mayor, and that he has not, the defendant* returned on this *mandamus* the conſtitution of the corporation, and to chuſe a mayor yearly, who was to act for a year, and until another was duly choſen; they likewiſe return the information, and the judgment of *ouſter*, and rely on the ſame, the year being out; ſo that the principal queſtion is, whether this judgment is a good bar to him from being now ſworn. It is true, it appears on the ſame record, that *Peter Pindar* was duly elected, though not ſworn: it ſeems, that by that means he ſhould be precluded from this office; but the judgment given in this caſe is the conſtant judgment in ſuch caſes, and the Court muſt take it to be good whilſt it is unreverſed; therefore taking it abſtractly, as the Court muſt do, without conſidering whether it is a proper judgment or not, it is as full an amotion as can be, and therefore *Peter Pindar* is entirely excluded whilſt this judgment ſtands in force.

* [335]

For which reaſon *a peremptory mandamus* was denied.

The

The King *againſt* Beecher and Another.

Caſe 256.

THIS was a motion for a *ſuperſedeas* to a *mandamus* to be directed to the juſtices of peace to ſign a poor-rate made by one part of the pariſhioners only.

The Court will grant a *mandamus* to juſtices to ſign a *poor rate*, although a former rate, made by part of the pariſh, was ſigned before.

By this rate part of the pariſh was not charged, upon pretence that it was extra-parochial; and there was another rate made by the majority of the pariſhioners, by which that part of the pariſh not charged was thereby charged, which laſt rate was ſigned by two juſtices.

Comb. 422. 478. 5. Mod. 275. 6. Mod. 229. Foley, 36, 37. 368. 2 Seſſ. Caſ. 65. pl 68. Carth. 450. B. R. H. 188.

So if a *mandamus* ſhould be directed to them to ſign this rate, it would contradict what they had already done by ſigning the other rate, which ought to be determined upon an appeal, before a *mandamus* ſhould be granted for the ſigning another rate, for otherwiſe there might be a double appeal.

THE COURT held, that if a *mandamus* was directed to the juſtices to ſign this rate, it would not be contradictory to that which was already ſigned, nor to themſelves, becauſe the conteſt is between the pariſhioners, in which the juſtices are not concerned, therefore they ought to ſign this rate, and not conteſt the right, it being a queſtion of fact between the pariſhioners, whether this place not charged in this rate, but charged by the other rate, is extraparochial, or not; which is fit to be tried in a feigned iſſue.

* [336]

* The King *againſt* Robinſon.

Caſe 257.

MANDAMUS directed to the mayor and aldermen, &c. of, &c. to proceed to the election of a new mayor, who was to be choſen out of the aldermen.

An *attachment* lies for making a frivolous return to a *mandamus*.

The return was, that there were no aldermen, &c.

And now the Court was moved for *an attachment* againſt the defendant, for that this was rather a banter than a return.

THE COURT. If there be no aldermen, yet *an attachment* muſt not go, but the plaintiff may have his action for *a falſe return*, or he may traverſe the return, if falſe; ſo there is no colour for *an attachment*.

But afterwards, upon farther conſideration, a rule was made to ſhew cauſe, &c.; for if it appear that this was a frivolous return, and purpoſely made to avoid the juſtice of the Court, *an attachment* ſhall go.

Anonymous.

Caſe 258.

THE PLAINTIFF obtained judgment againſt the principal for two thouſand three hundred and eighteen pounds, which judgment was conteſted by him ſo far as he could, even to an affirmance againſt the principal.

Bail ſhall pay intereſt from the time the judgment was had againſt the principal.

ANONYMOUS. affirmance in the houſe of lords, and afterwards the plaintiff obtained a judgment upon a *ſcire facias* againſt the bail.

The queſtion now was, Whether they ſhould pay *intereſt* from the time the judgment was had againſt the principal?

They offered to pay the principal ſum and coſts; and it was inſiſted for the plaintiff, that he ought to have the whole.

And THE COURT inclined to that opinion *(a)*.

(a) See Bodily v. Bellamy, 2. Burr. 1094.; and Frith v. Leroux, 2. Term Rep. 57.

Caſe 259.

The King *againſt* Chandler.

An indictment againſt a man for ſecreting a woman big with an *illegitimate fœtus* begotten by him is bad.
S. C. 2. Stra. 612.
S. C. 2. Ld. Ray. 1368.
S. C. 2. Seſſ. Caſ. 5.

THE DEFENDANT was indicted, for that *Alice Hunt* being with child *de illegitimo fœtu*, begotten by him (the defendant), he ſecreted her ſo that ſhe could not be had or found to give evidence for the pariſh againſt him.

To which indictment the defendant demurred, becauſe there cannot be an *illegitimate fœtus*.

And for that reaſon the defendant had judgment, for every *fœtus* is legitimate till born, for the parents may marry before the child is born; and if ſo, then the child is legitimate.

*[337]

Caſe 260.

*The King *againſt* Trinity Pariſh, in Cheſter.

An order removing *children* muſt mention their ages.
S. C. 2. Seſſ. Caſ. 70.
See Seſſ. Caſ. 82. pl. 84.
Id. 84. pl. 86.
S. P.

TWO JUSTICES made an order to remove the father and mother, and *John*, *Elizabeth*, and *Sarah*, their children, from the pariſh of, &c. to the pariſh of, &c.

It was now moved to quaſh it, becauſe it did not ſet forth the reſpective ages of the children, for they might be apprentices, or have ſerved for a year, and ſo have gained a ſettlement elſewhere.

And for this reaſon it was quaſhed as to the children; but it was good as to the father and mother.

Caſe 261.

The King *againſt* Nicholls.

Information againſt a juſtice of peace for denying to grant his warrant refuſed.

A MOTION being made for leave to file an information againſt the defendant *Nicholls*, who was mayor of *Stafford*, and a juſtice of peace, for his neglect of public juſtice in denying a warrant to the proſecutor, who was beaten by *T. S.*;

A rule was made to ſhew cauſe, &c.

And now it was moved to diſcharge that rule, becauſe the mayor had ſeveral people then before him to be examined concerning a riot which happened on that day; and it being late at night, he deſired

desired them to come the next day; which is the denial of which the profecutor now complained. THE KING *againſt* NICHOLLS.

And thereupon the rule was diſcharged, becauſe the mayor had done what juſtice he could; and the intent of the procuring this rule was to bring him into diſgrace, and to inflame the corporation againſt him.

So the profecutor was ordered to pay the coſts of the motion.

The King *againſt* The Mayor of Monmouth. Caſe 262.

THIS was likewiſe a motion for leave to file an information againſt the defendant for beating the informer, who gave no other provocation than ſaying to him, who kept an alehouſe, "Mr. Mayor, draw me a pot of drink." Information for beating the informer.

But it being the laſt day of the Term but one, THE COURT would make no rule to hang over a magiſtrate's head a whole Vacation.

So it was ordered to be moved the next Term, if they thought fit.

* Swetnam *againſt* Archer. Caſe 263.

PROHIBITION TO THE SPIRITUAL COURT, where the ſuit was for *a faculty* for a ſeat in, &c. (erected in a vacant place of the church, and at his own charge), annexed to his family.

A prohibition lies to the ſpiritual court to ſtay proceedings for a faculty for a ſeat in a church.

S. C. Fort. 346. Noy, 78. Latch, 116. Degge, p. 1. c. 12. 3. Inſt. 202. 2. Roll. Abr. 288. Gibſ. 198. 1. Wilſ. 326. 2. Salk. 552. Ld. Ray. 755.

The defendant oppoſed the granting of the *faculty*, by pleading, that the pew was not erected in a vacant place; that the pews in the church were pulled down without her conſent; and that this pew was erected in the place where ſhe before had a pew appurtenant to her meſſuage of *S.* which ſhe always uſed to repair; which plea being rejected by that court,

The plaintiff now moved for a prohibition, on a ſuggeſtion, that all *preſcriptions* and *cuſtoms* are triable only at common law; and that the defendant claims the ſaid pew, having always repaired the ſame: and on affidavit of the truth of the ſuggeſtion, and of her pleading the ſame below (*a*),

It was oppoſed, becauſe the church was new built by the pariſhioners, and for that reaſon there could be no preſcription to the ſeats, but that they were in the gift of the biſhop (*b*); and ſo a conſultation was prayed.

The plea tendered by the defendant was ſuch as could not be tried in the ſpiritual court, becauſe they cannot hold plea of the inheritance of the ſeats, nor of any thing which concerns the freehold.

(*a*) Noy, 129. Cro. Jac. 366. (*b*) 2. Bulſt. 150.

SWETNAM *against* ARCHER.

THE COURT. By the ſuggeſtion it appears, that the *preſcription* was pleaded below; which tied up the hands of THE ORDINARY from any further proceeding; for the ſpiritual court cannot try a preſcription. The ordinary has a right to diſpoſe of all vacant ſeats in the aiſle; but he cannot intermeddle with a temporal right. The ſuggeſtion is, that the pew was pulled down without the defendant's leave; which cannot deveſt her of her right, though it be executed at the charge of the pariſh. Here appear both the cauſes of prohibition: firſt, Want of juriſdiction; and, ſecondly, Want of trial.

Let there be a prohibition.

Caſe 264.

Archer *againſt* Swetnam.

A libel lies in the ſpiritual court for defaming the eſtabliſhed religion.

5. Co. 9. Cp. Lit. 96. Hard. 406. 2. Wilſ. 73. 1. Burr. 240. 6. Com. Dig. "Prohibition" (G. 1.):

MOTION for a prohibition to the ſpiritual court, the plaintiff being proſecuted there for ſaying, "I would not be of the "communion of THE CHURCH OF ENGLAND upon any conſide- "ration, for I believe if I was I ſhould be damned."

The reaſon offered for the prohibition was, becauſe the libel was for a contempt againſt the Common-Prayer Book, whereas this was not ſuch an offence.

THE COURT was of opinion, that though it is not an offence againſt the Common-Prayer Book, yet it is certainly of ſpiritual cognizance.

Therefore the prohibition was denied.

Caſe 265.

Brown *againſt* Coombs.

An attorney cannot be bail.

AN OBJECTION was made againſt the bail in this cauſe, for that it is againſt the rule of this court to take an attorney bail.

THE COURT. It is very true, there was ſuch a rule (*a*), but the intention of making it was, that an attorney ſhall not be taken as good bail, merely by his being an attorney; but when he is reſponſible, and juſtifies, and is a houſekeeper, then, though he is an attorney, he is good bail (*b*).

(*a*) Made in Michaelmas Term 1654, Dougl. 466.

(*b*) But by a rule of the Court made in Michaelmas Term 14. *Geo.* 2. "No "attorney ſhall be admitted as bail in "any action depending in this court:" and this rule has been extended to attorney's clerks, Bologue *v.* Vautrin, Cowp. 423.; and the ſame rule and deciſion has been made in the common pleas, Laing *v.* Cundale, 1. H. Bl. Rep. 76. But this rule does not apply to criminal caſes, Rex *v.* Bowes, Dougl. 466. *notis*; and if an attorney, or other perſon not permitted to become bail, be put into a bail-piece, and not excepted to, the plaintiff cannot take an aſſignment of bail-bond and proceed as if no bail had been put in, Thompſon *v.* Roubell, Eaſter, 22. *Geo.* 3. —See Jackſon *v.* Trindle, 2. Bl. Rep. 1180. But if objected to, he cannot juſtify, Dougl. 466.

The

The King *againſt* The Churchwarden of Rotherhithe, in Surrey.

Caſe 266.

A MOTION for *a mandamus* to the new churchwardens and overſeers of the poor, to make a rate to re-imburſe the old ones the ſeveral ſums by them expended for * the maintaining the poor the laſt year, was denied; it having already been reſolved, in *Tawney's Caſe* (*a*), that *a mandamus* cannot be granted to the new overſeers to make a rate to raiſe money to re-imburſe the old overſeers (*b*), but only to raiſe money for the relief of the poor; for ſo is the ſtatute 43. *Eliz.* c. 2. expreſsly, and muſt be purſued; and an overſeer is not bound to lay out money until he has it; if he do, he muſt make a new rate for relief of the poor, out of which he may retain ſo much as will pay himſelf (*c*).

Overſeers cannot make a rate to re-imburſe their predeceſſors monies expended in relieving the poor.

S. C. Shaw P. L. 196. 10. Mod. 104.

(*a*) 2. Salk. 531. 6. Mod. 97. 2. Ld. Ray. 1009.

(*b*) A rate made by overſeers "for the "neceſſary relief of the poor, *and* towards "*payment of money borrowed for repairing* "*and rebuilding the workhouſe*," is bad, Rex *v.* Wavel, Dougl. 115. But a rate to re-imburſe overſeers monies expended in law proceedings is good, Rex *v.* Micklefield, 1. Bott P. L. 78. pl. 103.

(*c*) See 17. *Geo.* 2. c. 38. ſ. 11.

HILARY TERM,

The Eleventh of George the Firſt,

IN

The King's Bench.

1725.

Sir John Pratt, *Knt. Chief Juſtice.*

Sir Lyttleton Powys, *Knt.*
Sir John Forteſcue Aland, *Knt.* } *Juſtices.*
Sir Robert Raymond, *Knt.* (*a*)

Sir Philip Yorke, *Knt. Attorney General.*

Sir Clement Wearg, *Knt. Solicitor General.*

(*a*) *Sir Robert Raymond*, being one of the Commiſſioners of the Great Seal, was abſent from the Court of King's Bench during the whole of this Term, 1. Stra. 619.

Strong *againſt* How. Caſe 267.

THE DEFENDANT, who was an attorney, had deeds delivered to him by the plaintiff, and gave a note under his hand to re-deliver them ſafe, whole, and uncancelled, to the plaintiff upon demand; which not being done, the plaintiff moved for *an attachment* againſt him, and obtained a rule for the defendant to ſhew cauſe why that writ ſhould not go.

If *A.* having a mortgage on the eſtate of *B.* deliver the title-deeds to Counſel, who, on a propoſed payment, delivers them to the mortgagor's attorney, taking a receipt to re-deliver them on demand, the Court will *attach* him for not delivering them.—S. C. 1. Stra. 621. Ante, 307. 1. Stra. 547. Dougl. 104. 238. 3. Term Rep. 275.

Afterwards it was ſhewed for cauſe, that theſe deeds were delivered to the defendant by the order of the plaintiff's brother, to be laid before Counſel for his opinion, and did not come to his poſſeſſion, as an attorney, in the way of his buſineſs; and that he delivered the deeds to the Counſel, who delivered them to a per-

STRODE *againſt* HOW.

ſon who lent his brother * two hundred pounds on a mortgage of his eſtate, ſo that he (the defendant) could not have them back again; and therefore the Court will not grant *an attachment* for not returning them when it is impoſſible it ſhould be done, eſpecially ſince, if the plaintiff has any right to the deeds, he may recover them in an action of *trover*, or by a *bill in equity*.

THE COURT. It is an eſtabliſhed rule of this court, wherever deeds or writings come to an attorney in the way of his buſineſs, to compel him to re-deliver them to the perſon of whom he received them; for as he is entruſted with them, the Court will compel him to execute the truſt, he being ſubject to the juſtice of this court: and it is not material, whether he is an attorney of this court, or not, if he practiſes therein; and the other courts have the ſame power over the attornies of this court; and they have gone ſo far as to compel a Counſel to deliver up the writings entruſted with him. As to ſuing for them, it would be very inconvenient to put the deliverer to a ſuit, either at law or in equity; for he may not be able to defend his poſſeſſion for want of them.

Whereupon the rule was made abſolute *(a)*.

(a) See the caſe of Sir Richard Hughes v. Mayre, 3. Term Rep. 275.

Caſe 268.

Anonymous.

Where bail are diſcharged upon the ſurrender of the principal.
Ante, 131.
6. Mod. 238.
1. Stra. 198.
1. Ld. Ray. 357.
Tidd's Pract. 145.
1. W.Bl. 270.
4. Burr. 2134.
3. Burr. 1360.
1. Bl. Rep. 393.
1. Bac. Abr. "Bail" (D.).

THE practice of the court of king's bench is, that where judgment is obtained againſt the principal, the bail may ſurrender him at any time before the return of the firſt *ſcire facias*, where it is afterwards returned *ſcire feci*, or at any time before the return of the ſecond *ſcire facias*, where two *nihils* are returned. And if the plaintiff proceed by action of debt on the recognizance, the bail may ſurrender the principal within eight days after the return of the writ.

The principal caſe was an action of debt on the recognizance againſt the bail, and the writ was returnable the eſſoin-day of the Term, and the principal was ſurrendered, and an *exoneretur* entered on the bail-piece the fourteenth day of *January*.

So it was moved, that the bail might be diſcharged;

And they were diſcharged accordingly.

Caſe 269.

Matthias Carter's Caſe.

To ſell *protections* in the name of a *peer* is a contempt of privilege.

ON *Thurſday* the fourth day of *February* 1734, one *Matthias Carter*, gentleman to the *Earl of Suffolk*, was, by order of THE HOUSE OF PEERS, committed to NEWGATE, on proof of his being guilty of procuring and ſelling written *protections*, from and in the name of that PEER, to ſeveral perſons, to the great damage of

of * their creditors, and in breach of the ſtanding orders of that houſe. MATTHIAS CARTER'S CASE.

And he was alſo found guilty of an unlawful combination with others to charge falſly on their oaths certain perſons for ſpeaking ſcandalous and inſolent words, reflecting on the houſe of peers, and was ſentenced to pay a fine of twenty nobles, to ſuffer three months impriſonment, and to ſtand twice in the pillory. All which was done accordingly, without any trial by jury.

The houſe of peers may commit for conſpiring to charge a perſon with ſlander of the houſe. Ante, 179.

1. Ruſh. 262. 5. Com. Dig. "Parliament" (L. 11.).

King and his Wife *againſt* Baſingham.

Caſe 270.

Aſſumpſit for money lent by huſband and wife *ad damnum ipſorum* is bad. S. C. ante, 199. Cro. Jac. 644. 473. Salk. 114. pl. 2. 6. Mod. 149. 3. Mod. 120. 5. Com. Dig. "Pleader" (2. A.). Andr. 242.

ASSUMPSIT, &c. in which the plaintiff declared for money lent by the huſband and wife, &c. and that it was not paid, *ad damnum ipſorum:* and a verdict was given for the plaintiff.

IT WAS MOVED *in arreſt of judgment*, that the declaration was ill; for it is plain the wife can have no property in the money of the huſband. Beſides, by this ſort of declaring the right would ſurvive to the wife, whereas it ought to go to the executors of the huſband. It is true, that where there is an expreſs promiſe made to the wife, for ſome ſpecial act by her done, and where the duty would ſurvive, they may declare *ad damnum ipſorum*; as where they declared, for that the defendant was indebted to them for work done by the wife in making a peruke for the defendant, he promiſed to pay, but had not paid, *ad damnum ipſorum*, this was held well enough (*a*); but in trover by huſband and wife, in which they declared *quod cum poſſeſſionati fuerunt, &c.* and that the defendant had converted, &c. *ad damnum ipſorum*, this was adjudged ill after a verdict, becauſe both the poſſeſſion and property was in the huſband (*b*).

IT WAS INSISTED *for the plaintiff*, that if this declaration can be ſupported by any intendment, it ought, after a verdict, to be made in favour of the plaintiff's right. Now this may be the money lent by the wife before the marriage, and the promiſe made to her and the huſband after marriage (*c*). If this had been an action of covenant, on a covenant made to them, it would have been good (*d*); and ſo it would in a joint action brought by them for rent on a leaſe made to them (*e*), or in an action of debt on a bond made to them (*f*): ſo where the wife paid a marriage portion, and a promiſe was made to her to repay it; and the action was brought by her and her huſband (*g*): ſo where an action on the caſe was brought by the huſband and wife againſt an executor, upon a

Cro. El. 61. Sid. 25.

Hilliard *v.* Hambridge, Allen, 37.

(*a*) Buckley *v.* Collier, 1. Salk. 114. — See alſo Braſſford *v.* Buckingham and his Wife, Cro. Jac. 77.
(*b*) Jones, 325.
(*c*) 1. Salk. 117. 1. Ld. Ray. 368. 12. Mod. 207.
(*d*) 1. Roll. Abr. 348.
(*e*) Cro. Eliz. 700. 537.
(*f*) Co. Lit. 55.
(*g*) See 3. Com. Dig. "Baron et Feme" (V.).

promiſe

KING AND HIS WIFE *againſt* BASINGHAM.

promiſe made by * his teſtator after coverture to pay eight pounds a year to the wife during her coverture; after a verdict for the plaintiff, it was moved in arreſt of judgment, that the action ſhould be brought by the huſband alone, becauſe the whole benefit was to him, for that the promiſe was made ſince the marriage; but it was adjudged, that the huſband alone might bring the action or join his wife (*a*).

THE COURT inclined againſt the plaintiff, for it being laid *ad damnum ipſorum* made the declaration ill; and ſo it was adjudged in *Cro. Jac.* 479.

(*a*)

Caſe 271.

Myer *againſt* Yellop.

Attachment cannot be granted for a *reſcous* before the ſheriff has returned the writ. Ante, 110. Cæſar v. Holt, S. P.

AN ATTACHMENT was granted upon affidavits made againſt the defendant for a *reſcous*, and this was before the ſheriff had returned his writ, which being contrary to the old practice in ſuch caſes, it was ſet aſide.

Caſe 272.

Read *againſt* Marſhall.

Where the wife need not be joined with the huſband in the action. S. C. ante, 26. S. C. Forteſ. 377. Cro. Jac. 501, 502. 538. Ruſſell et Ux. v. Corne, Salk. 119.

THE PLAINTIFF brought an action againſt the defendant for entering his houſe, taking away his goods, and for beating his wife, and had judgment by default; and upon a writ of inquiry, the jury gave one hundred pounds damages.

The defendant moved in arreſt of judgment, that the wife ought to be joined in this action.

TO WHICH *it was anſwered*, that beating the wife was only laid to aggravate the damages.

THE COURT ſeemed to be of that opinion (*a*).

(*a*) It is ſaid, S. C. Fort. 377. that it was held well, though the wife did not join.

Caſe 273.

Anonymous.

A bail-bond wherein the obligor is bound *in quadrant libris* is good. Cromwell v. Grunſden, Salk. 462. 2. Lev. 166. 5. Mod. 281.

UPON A MOTION in arreſt of judgment in an action of debt upon a bail-bond, wherein the obligor was bound *in quadrant libris*, conditioned, that *T. S.* ſhould appear on the return of the writ.

The objection was, that the word "*quadrant*" is inſenſible: it is true, if the condition had been for payment of money, ſo that it might explain what was meant in the bond, it might be good; but where the bond is ſingle, or the condition is for doing ſome collateral act (as in this caſe it was), which does not explain what ſum is intended in the bond, there it is void.

To

* To WHICH *it was answered*, that it may be well on the roll. ANONYMOUS.

THE COURT thereupon ſtayed all proceedings until THE ROLL was brought in; and ſaid, though the condition of this bond was collateral, yet the bond being made according to the ſtatute 13. *Car.* 2. c. 2. by which it is enacted, "that none arreſted by "proceſs, &c. in which the true cauſe of action is not expreſſed, "and for which the defendant is bailable, by virtue of the ſtatute "23. *Hen.* 6. c. 10. ſhall be forced to enter into a bond, with "ſureties for appearing, in any ſum exceeding forty pounds," and the condition of this bond being for appearing, &c. that may explain what is intended by the word "*quadrant*" in the bond, *viz.* forty pounds, according to the ſtatute.

Cotton *againſt* Owen. Caſe 274.

REPLEVIN for taking his goods. The defendant avowed, and juſtified the taking *damage feaſant*. The plaintiff replied, that the goods were there, &c. by virtue of a demiſe made to him by the avowant himſelf, and that he entered and was poſſeſſed, &c. The defendant rejoined, and traverſed the poſſeſſion, but gave no anſwer to the demiſe ſet forth in the replication to be made by himſelf. For which reaſon the plaintiff demurred, and the defendant joined in demurrer.

A *rejoinder* which does not ſupport *the bar* is bad on *demurrer*. Co. Lit. 303. 1. Saund. 377. 1. Wilſ. 141. 5. Com. Dig. "Pleader" (H.).

IT WAS INSISTED *for the plaintiff*, that ſince the traverſe of the poſſeſſion was immaterial, and nothing ſaid as to the demiſe (*a*), the plaintiff ought to have judgment.

And accordingly judgment was given for him.

(*a*) 11. Co. 10. Hob. 81.

Perry *againſt* Kirk. Caſe 275.

IN AN ACTION brought againſt the defendant for goods ſold and delivered, the plaintiff declared in *aſſumpſit*, and in his declaration laid ſeveral counts, and alſo declared on *a promiſſory note*. Upon *non aſſumpſit* pleaded, the parties were at iſſue.

A *latitat* may be ſued out before cauſe of action, but the plaintiff cannot declare before the cauſe of action ariſes.

THE COUNSEL *for the defendant* inſiſted, at the trial of the cauſe, on a ſpecial agreement, and that the defendant did not owe the plaintiff anything at the time of the arreſt; and for that purpoſe he inſiſted, that the plaintiff might produce this note, for he only proved the ſale and delivery of the goods, whereas he ought not to proceed on that count and no other.

* [344]

S. P. Ventr. 28. S. P. Barnard. K. B. 57. Cro. Eliz. 271. Cro. Jac. 561. 1. Wilſ. 142. 2. Burr. 967. Dougl. 62.

THE COUNSEL *for the plaintiff* * thereupon produced the note dated the eighteenth of *April* 1724, which was for the payment of ſixty pounds.

Tidd's Pract. 189. Cowp. 454. 1. Com. Dig. "Action" (E.).

THE

PERRY *againſt* KIRK.

THE COUNSEL *for the defendant* then produced a receipt under the plaintiff's hand, by which it appeared, that the defendant was to have ſix weeks time from the date of the note to pay this money; therefore the plaintiff cannot maintain this action, becauſe the proceſs againſt the defendant bears *teſte* on the eighteenth *May*; ſo the ſix weeks were not yet expired.

TO WHICH *it was anſwered*, that the declaration was of *Trinity Term*, which was above ſix weeks after the date of the note, and that is the only thing of which the Court ought to take notice; for the original proceſs was only to bring the defendant *in cuſtodiâ mareſchalli*, which may well be before the cauſe of action.

THE COURT held that to be the conſtant difference; for the plaintiff may ſue out a *latitat* before the cauſe of action, but he cannot declare until after the cauſe of action ariſes (*a*).

(*a*) Foſter v. Bonner, Cowp. 454. Ward v. Honeywood, Dougl. 61.

Caſe 276.

Ancell *againſt* Sloman.

A plaintiff who ſues *in formâ pauperis* ſhall pay no coſts on a nonſuit.

THE PLAINTIFF being admitted *in formâ pauperis* by this Court, brought an action againſt the defendant, in which he was nonſuited, and was taken in execution for the coſts of this nonſuit, having an eſtate fallen to him ſince.

IT WAS MOVED, that he might be diſcharged, becauſe by the ſtatute 23. *Hen.* 8. c. 15. he who ſues *in formâ pauperis* ſhall pay no coſts, but ſhall ſuffer ſuch puniſhment as the Court ſhall think fit.

THE COURT was of opinion, that if the plaintiff was a pauper when the cauſe was tried, he ſhall not pay coſts, and the deſcent of lands to him ſhall not have relation to that time.

SO A RULE was made to diſcharge him.

Caſe 277.

The King *againſt* The Officers of St. Mary's Pariſh in Marlborough.

Mandamus to the juſtices to make a rate for the relief of the poor.

S. C. 1. Stra. 700. 2. Seſſ. Caſes, 65.

MANDAMUS to the juſtices to make a rate for the ſupport of the poor of the pariſh of *St. Mary* in *Marlborough*.

It was oppoſed, becauſe the pariſh-officers ought to make the rate, and the juſtices are only to ſign it.

TO WHICH *it was anſwered*, that this motion was grounded on the ſtatute 43. *Eliz.* c. 2. ſ. 3. by which it is enacted, "That if "the juſtices of the peace do perceive that the inhabitants * of any "pariſh are not able to levy among themſelves ſufficient ſums of "money for the maintenance of their poor, that then the ſaid two "juſtices ſhall and may tax, rate, and aſſeſs, as aforeſaid, any other

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"of

" of other pariſhes, or out of any pariſh within the hundred " where the ſaid pariſh is, to pay ſuch ſum and ſums of money to " the churchwardens and overſeers of the ſaid poor pariſh, for the " ſaid purpoſes, as the ſaid juſtices ſhall think fit, according to the " intent of this law."

THE KING *againſt* THE OFFICERS OF ST. MARY'S PARISH, IN MARLBOROUGH.

Thereupon a *mandamus* was granted, directed to the juſtices; and, PER CURIAM, as this is a matter of right, they ought to make a return (*a*).

(*a*) The juſtices made an order, that the pariſh ſhall contribute "*ſo long as we* "*ſhall think fit*;" and it was quaſhed, becauſe the direction given to the juſtices by the 43. *Eliz.* c. 2. ſ. 3. is only as to the *quantum*, and not to the *duration*, of the contribution. 1. Stra. 700. S. C 16. Viner Abr. 416. Mr. Conſt's edit. Bott's P. L. 1 vol. 306.

Phillips *againſt* Doelittle. Caſe 278.

A LEASE was made, reſerving rent; and for non-payment thereof, that the leſſor might re-enter. The rent was not paid; and thereupon the plaintiff brought an ejectment, and had judgment.

In ejectment for non-payment of rent, the proceedings may be ſtayed upon bringing in the rent, and coſts, &c. although the plaintiff has obtained judgment. Ante, 305. Poſt. 379.

A MOTION was now made to ſtay the proceedings upon payment of what rent was due, and all the coſts to this preſent time.

A RULE was thereupon made, that the defendant ſhould go before THE MASTER, &c. and that he ſhould take an account of what rent was due, &c. and that proceedings ſhould ſtay in the mean time (*a*).

Eſp. Dig. 430. Barnes, 280. Salk. 596. 5. Com. Dig. "Pleader" (C. 10.).

Afterwards it was moved to diſcharge this rule, becauſe it was made on an extraordinary motion; for the common motion is to ſtop proceedings on payment of what was due; now there can be no proceedings after judgment.

TO WHICH *it was anſwered*, that though the plaintiff had judgment, yet this was a proper motion where ſuch judgment was in ejectment; and this entirely depends on the rules of the court.

CURIA. The Court uſually ſtays proceedings in ejectment on reaſonable terms, at any time before execution executed.

But in this caſe IT WAS RULED, that if the defendant did not bring in to THE MASTER, within three days, what rent was juſtly due, and the coſts, that then the plaintiff might take out execution (*b*).

(*a*) See 4. *Geo.* 2. c. 2.

(*b*) See Downes *v.* Turner, Salk. 597. Smith *v.* Parks, 10. Mod. 383. Withers *v.* Sturdy, Bull. N. P. 97.—See alſo the ſtatute 4 *Geo.* 2. c. 28. and the caſe of Goodtitle *v.* Holdfaſt, 2. Stra. 900. and Stevenſon *v.* Noright, 2. Black. Rep. 746. Holdfaſt *v.* Morris, 2. Wilſ. 115.

Martin

Caſe 279.

Martin *againſt* Pritchard.

Where payment *before the day* is payment *at the day*.

S. C. 1. Stra. 622. 5. Co. 43. Cro. Eliz. 823. 672. 2. Mod. 33. Salk. 519. Stra. 691. 2. Wilſ. 173. 2. Burr. 944. 3. Term Rep. 599. 5. Com. Dig. "Pleader" (2. W. 29.).

AN ACTION OF DEBT was brought in the court of common pleas, on a bond conditioned to pay a hundred pounds with intereſt on the fifth day of *December*, &c. The defendant pleaded, that after making the bond, *et ante diem impetrationis brevis originalis, videlicet*, on the firſt of *December*, he paid the money, &c. The plaintiff replied, "*non ſolvit modo et formâ.*" The defendant demurred ſpecially, for that payment before the day was no good plea. The plaintiff joined in demurrer; and judgment was given for the plaintiff in the court of common pleas.

A writ of error was brought in this court.

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*STRANGE argued, that the replication was ill, having put in iſſue a day which is not material; as in the caſe of *Merril v. Joceline* (*a*), where, in debt on bond, the defendant pleaded payment before the day; and plaintiff in his replication took iſſue thereon, and the iſſue was held immaterial. The day in the plea, though coming after the *videlicet*, cannot be rejected (*b*); for it is not inconſiſtent with any matter precedent.

THE COURT. In the caſe of *Merril v. Joceline*, the defendant ſhould have pleaded *ſolvit ad diem*; but having pleaded a payment before the day, the point in iſſue only turned on that fact, which made the iſſue material only if found one way; therefore in that caſe the plaintiff ſhould have demurred. In this caſe the day is intirely immaterial; this is a plea upon the ſtatute of 4. & 5. *Anne*, c. 16. ſo that the queſtion is only, whether the principal and intereſt was paid before the original ſued. If an original be produced ſubſequent to the firſt of *December*, the plea will be good; for the day is only form.

The judgment was affirmed (*c*).

(*a*) 10. Mod. 147.
(*b*) Cro. Jac. 550. 586.
(*c*) See Cowne *v.* Barry, 2. Stra. 954. Fletcher *v.* Hennington, 1. Black. Rep. 210. 2. Burr. 944. Winch *v.* Pardon, Buller N. P. 174. Sturdy *v.* Arnaud, 3. Term Rep. 601.

Caſe 280.

Parſons *againſt* Peacock.

An executory deviſe to two, upon a contingent of a third dying in the life-time of thoſe two.

REPLEVIN. The defendant avowed for a *rent charge* deviſed by his grandfather to his uncle, and his heirs, which was now deſcended on him, this avowant. The plaintiff, in his replication, confeſſed the deviſe, but ſet forth a clauſe in the ſame will by which the rent-charge was to ceaſe.

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S. C. 2. Eq. Abr. 340. 1. Lev. 136. 1. Salk. 229. 233. 1. Com. Dig. "Deviſe" (N. 17.).

* The caſe was thus: *A.* being ſeiſed in fee, and having three ſons, deviſed *Black-Acre* to *Giles* his eldeſt ſon, and to his heirs, and *White-Acre* to *Edward* his ſecond ſon, and his heirs, and *a rent-charge* of fifty pounds a year, iſſuing out of *White-Acre*, to *Roger* his youngeſt ſon, and his heirs; "PROVISO, that if either of "his

« his ſons ſhould die without iſſue, living the other two, ſo as his « eſtate in lands ſhould come to the other two ſons, then the rent « ſhould ceaſe." *Giles* died, leaving iſſue *John Peacock*, the defendant; and *Roger* died without iſſue.

PARSONS *againſt* PEACOCK.

This contingency could never happen, becauſe *Giles* had iſſue, and he being dead, and *Roger* likewiſe, without iſſue, their eſtate in lands could never come to two, where *Edward* alone was ſurviving; therefore the rent-charge muſt deſcend to the defendant as heir at law, being the ſon of *Giles*, the eldeſt ſon of the teſtator; for this is an *executory deviſe* to two on the contingency of one dying in the life-time of the other two, which contingency muſt ariſe within the compaſs of one life, otherwiſe it is void; for it is plain, that the teſtator intended this benefit of ſurvivorſhip during his ſons lives only.

And THE COURT being of that opinion, judgment was given for the defendant.

Memorandum.

Caſe 281.

SIR JOHN PRATT, *Chief Juſtice* of the Court of King's Bench, died on *Wedneſday* the twenty-fourth day of *February* 1725. He was ſucceeded on the third of *March* following by SIR ROBERT RAYMOND, *Knight*.

EASTER

EASTER TERM,

The Eleventh of George the First,

IN

The King's Bench.

1725.

Sir Robert Raymond, *Knt. Chief Juſtice.*
Sir Lyttleton Powys, *Knt.*
Sir John Forteſcue Aland, *Knt.* } *Juſtices.*
James Reynolds, *Eſq.*
Sir Philip Yorke, *Knt. Attorney General.*
Sir Clement Wearg, *Knt. Solicitor General.*

Heavyſide *againſt* Davis.

Caſe 282.

Bankruptcy in the principal ſhall not avoid a judgment regularly obtained againſt the bail.

BY the ſtatute 5. *Geo.* 1. c. 24. (*a*) it is enacted, "That if "the commiſſioners ſhall certify to the lord chancellor, that "the bankrupt hath made a full diſcovery of his eſtate, and "if four parts in five in number and value of the creditors ſhall "ſign ſuch certificate, and teſtify their conſent to the allowance "thereof, and if it is allowed by the lord chancellor, then if the "bankrupt be taken in execution, he, upon producing ſuch certi-"ficate allowed and confirmed, &c. ſhall be diſcharged by any "Judge of that court wherein the judgment was obtained."

In the principal caſe, there was judgment againſt the defendant, who became a bankrupt, and the plaintiff did not come before the commiſſioners to prove his debt, but took out a *ſcire facias* againſt the bail; and after two *nihils* returned, had judgment againſt them, and they were taken in execution.

(*a*) See 5. *Geo.* 2. c. 30. ſ. 10. & 13.

HEAVYSIDE *againſt* DAVIS.

IT WAS NOW MOVED, that they might be diſcharged, becauſe a certificate of the commiſſioners allowed by THE LORD CHANCELLOR is a diſcharge of the principal, who, if he had been taken in execution, would have been diſcharged upon producing it.

THE COURT. The judgment againſt the bail being regularly obtained, there being fifteen days between the *teſte* of the firſt writ of *ſcire facias* and the return of the ſecond, and two *nihils* returned, bankruptcy in the principal ſhall not be given in * evidence to avoid ſuch a judgment regularly entered againſt the bail (*a*).

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(*a*) See Wooley *v.* Cobbe, 1. Burr. 244. Tudway *v.* Bourn, 2. Burr. 716. Walker *v.* Giblet, 2. Bl. Rep. 812. Southcote *v.* Braithwaite, 1. Term Rep. 624.

Caſe 283.

Griffith's Caſe.

In debt on a bond to pay within *twenty days* after the return of a ſhip, OR at the end of eighteenmonths, if the defendant plead a return within eighteen months and payment within twenty days, A DEMURRER to a *replication* traverſing the payment, admits the breach.

DEBT UPON A BOTTOMRY BOND conditioned, that ſuch a ſhip ſhould go from *London* to *Buenos Ayres*, and return thither within eighteen kalendar months without any deviation (the danger of the ſeas excepted), and that then the obligor ſhould pay ſo much money, &c. within twenty days after ſuch return, or at the end of eighteen months, &c.

The defendant in his plea did not anſwer the deviation, but pleaded that the ſhip did return within eighteen months, and that he paid the money within twenty days.

The plaintiff did not demur to this plea (as he might for not anſwering the deviation), but replied, and traverſed the return of the ſhip within eighteen kalendar months.

To which replication the defendant demurred, and the plaintiff joined in demurrer.

Plowd. 13. 172. Co. Lit. 72. 2. Roll. Rep. 22. Yelv. 195. Cro. Eliz. 829. Dyer, 15. B. R. H. 106. 1. Ld. Ray 344. 2. Ld. Ray. 1039.

IT WAS NOW INSISTED *for the plaintiff*, that the condition being in the disjunctive, *viz.* to pay ſo much money within twenty days after the return of the ſhip, *or* at the end of eighteen months, the defendant might have pleaded performance of either part of the condition; and here he pleaded performance of one part, *viz.* that the ſhip did return within eighteen kalendar months; which being traverſed by the plaintiff was confeſſed by the demurrer; ſo that one part of the condition being falſified by this demurrer, the plaintiff muſt have judgment.

And by the opinion of THE COURT, judgment was given for him accordingly.

Anonymous.

Anonymous. Caſe 284.

THE PLAINTIFF, who was tutor to two young ſcholars in *Cambridge*, brought an action on the caſe againſt their father; and declared upon an *indebitatus aſſumpſit* to pay ſo much for his ſalary for five years and nine months, and upon a *quantum meruit*, &c. and had judgment by default, and a writ of inquiry for damages which was executed, and general damages given.

The Court will quaſh a writ of enquiry, if damages be given for a time ſubſequent to the action. Ante, 197. 213. 2. Leon. 214. 2. Wilſ. 358. 3. Wilſ. 61. 5. Com. Dig. "Pleader" (Z. 5.).

IT WAS MOVED *in arreſt of judgment*, that this writ of inquiry was executed the fourth day of *February*; whereas the five years and nine months did not incur until the twentieth day of *March* following; ſo * that the jury having given damages generally, the plaintiff cannot have judgment for the damages for the time not incurred, which he muſt have if he has judgment upon this record.

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And THE COURT inclined to that opinion.

Wilſon *againſt* Machin. Caſe 285.

BY the ſtatute 8. & 9. *Will.* 3. c. 17. it is enacted, "That every "perſon obtaining judgment againſt the marſhal or warden, "&c. ſhall have their profits or ſome part thereof ſequeſtered to- "wards the ſatisfaction of the debt with coſts and damages; but "that act was not to leſſen the ſecurity for money out of the mar- "ſhalſhip of the king's bench priſon made by *William Lenthall, Eſq.* "to *Sir John Cutler*, now veſted in his executor *Edmund Boulter*."

Where judgment is had againſt the marſhal, the profits of the priſon ſhall be ſequeſtered. See Stat. 27. *Geo.* 2. c. 17.

The marſhal having ſuffered an eſcape, there was judgment againſt him for eighteen thouſand pounds.

And now a motion was made in behalf of the creditor to ſequeſter the profits of the king's bench priſon, towards the payment of the ſaid debt.

This was oppoſed by the aſſignees of *Boulter's* mortgage, for that there were fourteen thouſand pounds ſtill due to them for principal and intereſt; and that if the plaintiff would diſcharge that debt, he might take the profits of the priſon to ſatisfy his debt.

Thereupon it was moved, that an account might be taken of what was due on that mortgage at the time the act was made, for it extends to no farther ſum than what was then due, and what profits were received by the aſſignees, or might have been received without wilful default.

Which was granted accordingly.

The King *againſt* Butler. Caſe 286.

ONE *Hunt* was bailiff of the corporation of *White-church* in *Hampſhire*, in the year 1722, at which time *Batchelor* was choſen mayor by the jurors ſummoned by the ſaid *Hunt*; and then

The Court will grant an information *quo warranto*, if there appear to be a queſtion neceſſary to be tried.—See Eſpinaſſe Dig 688.

THE KING *againſt* BUTLER.

the mayor continued *Hunt* bailiff for the next year, *viz.* for the year 1723, being the year of his mayoralty.

Thereupon an information in nature of a *quo warranto* was granted both againſt *the mayor* and *Hunt*, ſuggeſting that no man could
*[351] be mayor or bailiff there who was non-reſident, * and choſen by non-reſidents, and that both *the mayor* and *bailiff* were non-reſidents, and therefore had uſurped a franchiſe. And at the trial a verdict was found for *the mayor*, that he was an inhabitant reſident, and againſt *Hunt*, that he was non-reſident; thereupon the mayor named one *Page* to be bailiff.

THE QUESTION now was, Whether the mayor could name a new bailiff; or, Whether one *Neeve*, who was bailiff before this mayor was elected, ſhould continue bailiff, becauſe, by the conſtitution of this corporation, a bailiff duly elected is to continue in his office for a year, and until another is duly choſen, and *Hunt* was never duly choſen, becauſe he was non-reſident.

And this being a controverted point, another information, &c. was granted to try it.

PER CURIAM. Informations in nature of a *quo warranto* may be brought (with leave of the Court) at the relation of any perſon deſiring to proſecute; and this is by virtue of the ſtatute 9. *Ann.* c. 20. the end of which ſtatute was to prevent frivolous and vexatious controverſies, and therefore informations were not to be filed without leave of the Court; but the queſtion in this caſe ſeemed doubtful, and ſince it is controverted it ought to be tried.

Caſe 287.

Phillibrown *againſt* Ryland.

A declaration for ſhutting a pariſhioner out of a room where the veſtry was held, muſt ſhew that he had a right to enter into that room.
S. C. ante, 52.
S. C. 1. Stra. 624.
S. C. 2. Ld. Ray. 1383.
1. Com. Dig. "Action on the Caſe" (A.).

THIS was a ſpecial action on the caſe brought by *a pariſhioner* againſt the defendant, for ſhutting him out of THE VESTRY, he having offered to come in and vote amongſt the pariſhioners.

The plaintiff declared, that public notice was given for an aſſembly to be held in THE VESTRY-ROOM, adjoining to the church, being the uſual place for meeting; that every pariſhioner who paid ſcot and lot had a right to be preſent and vote at THE VESTRY; that the plaintiff was a pariſhioner, &c. and paid ſcot and lot, and was coming to the ſaid veſtry, but was ſhut out by the defendant, ſo that he could not be preſent and give his vote at the meeting of the pariſhioners, and conſulting for the good of the pariſh, *per quod*, &c.

The defendant demurred ſpecially to this declaration, for that the plaintiff did not ſhew any ſpecial damage by his being ſhut out.

The plaintiff joined in demurrer.

IT WAS ARGUED *for the defendant*,

FIRST, That an action on the caſe could not be maintained, without ſhewing ſome ſpecial damage.

SECONDLY, That where ſeveral have a right in common with * others, the law will not allow that one of them ſhall have an action, becauſe this would create multiplicity of ſuits. The offence in this caſe was ſhutting the door; which is an offence equally to every inhabitant, being equally a damage to each; and therefore ought not to be puniſhed by action, which would be infinite, but as a nuſance, by indictment or information: as for inſtance, where a man ſtops up a way, the law will not allow an action to be brought againſt him by one, without ſhewing ſome ſpecial damage to himſelf; for the conſequential damage which may happen by ſtopping the way, will not ſupport an action (*a*). So where the cuſtom of the manor was for the copyholders to name their ſucceſſors; and a copyholder having named one to ſucceed him, the lord refuſed to admit him, for which he brought an action, but it was adjudged, that it did (*b*) not lie (*c*); for if one might bring an action, every one might do the like; therefore to avoid multiplicity of actions, it was held that this action would not lie. So where a lord of a manor brought an action againſt the vicar, for not celebrating the ſacraments in his pariſh church (*d*), it was adjudged that it would not lie, becauſe the right to receive them was in common to all the pariſhioners, and he had laid the right in himſelf *et in omnibus tenementibus ſuis*, but it might have been otherwiſe if he had laid the right in himſelf and family. And the reaſon why the action would not lie is, becauſe the not celebrating the ſacraments was an equal damage to all the pariſhioners, and therefore one alone ſhall not bring an action; for if he might, it would multiply actions, which the law will not allow: beſides, the plaintiff had a proper remedy in the ſpiritual court. And all this was adjudged in *Williams's Caſe* (*e*), which was an action for a common nuſance in the highway; and it was held that it would not lie, becauſe it was unreaſonable that any particular perſon ſhould have an action where the damage was in common to many; for if he ſhould, then every man might have the like action againſt the defendant, and ſo he would be puniſhed many times for the ſame cauſe; but if one has a more particular damage done to him than another, in ſuch caſe he may have an action for that particular injury, but not for a nuſance, becauſe that is common to all people: and the common law has appointed another method to puniſh offenders of that nature, *viz.* by preſentment at the leet, or by indictment. So where an action was brought by one of the inhabitants of *Littlebury* againſt the defendant, for not keeping up an ancient ferry-boat there, for them to paſs over the river toll-

* [352]

(*a*) Cro. Eliz. 84. 466.
(*b*) The chief reaſon was, becauſe the copyholder before admittance had neither *jus in re* nor *ad rem*. Cro. Jac. 368. pl. 1.
(*c*)
(*d*)
(*e*) 5. Co. 73.

PHILLIBROWN *againſt* RYLAND.

* [353]

free, it was held, that this action would not lie (*a*), becauſe the not keeping up the ferry-boat was a damage to all people who * had occaſion to paſs that way, but the not paying toll was an eaſement to the inhabitants of that vill only; but an action would lie by an inhabitant of *Littlebury* for taking toll, for that is a private right. So where the plaintiff brought an action for ſtopping a highway near his colliery, the Court was divided whether the action would lie (*b*), for that it was the king's highway, and the plaintiff had only a convenience to paſs, but no right to the way.

THIRDLY, But admitting this action would lie, yet this declaration is not good, becauſe the plaintiff did not ſet forth any legal or preſcriptive right in the pariſhioners to meet at a veſtry. The plaintiff ſhould have alledged a right in the inhabitants, time whereof, &c. to be preſent and vote; for otherwiſe there may be a ſelect veſtry, which was the caſe here; and the intent of this action was to try the validity of ſelect veſtries. It is true, he alledges that every pariſhioner who paid ſcot and lot had a right to be preſent and vote, &c. but that might be a voluntary right, for the pariſhioners are no body politick to take any legal or preſcriptive right.

FOURTHLY, Beſides, the plaintiff did not ſet forth that the pariſhioners had a right to meet in this room, and if they had no ſuch right, then the action will not lie for ſhutting the plaintiff out of that room, for it may be in the defendant's own houſe, or in the houſe of ſome other perſon where the plaintiff had no right to enter. As treſpaſs will not lie for taking goods from the perſon of the plaintiff, unleſs he ſhews that they were his own goods (*c*), for they might be the defendant's goods for any thing that appears to the contrary.

FIFTHLY, Neither did the plaintiff ſhew, that the right was in all the pariſhioners, or that this was a ſelect veſtry.

THOSE WHO ARGUED *for the plaintiff* anſwered the objections made by the defendant's Counſel.

FIRST, As to the objection, that this was *damnum ſine injuriâ*, and that the plaintiff ſhould ſhew ſome ſpecial damage to himſelf, &c. it is true, an action will not lie for a damage without an injury; but it does not follow from thence, that an action will not lie for an injury without ſhewing ſome ſpecial damage; for every injury implies a damage, which is fully proved by the caſes in the margin (*d*).

(*a*) This is the caſe of Payne *v.* Partridge, 3. Mod. 289. 1. Show. 243.

(*b* Iveſon *v.* More, 1. Salk. 15. S. C Comy. Rep. 58. But this caſe was afterwards argued before all the Juſtices of the Common Pleas and Barons of the Exchequer at *Serjeants Inn*, and they were all of opinion for the plaintiff, that the action well lay. S. C. 1. Ld. Ray. 495. S. C. 12. Mod. 263.

(*c*) Yelv. 36.

(*d*) Year Book 11. *Hen.* 4. pl. 47. Cro. Jac. 478. 1. Roll. Rep. 81. 1. Vent. 206. 2. Vent. 25. 2. Lev. 250. 6. Mod. 45. 1. Salk. 19. 37.

SECONDLY,

SECONDLY, As to the objection, that this action will not lie, for if it ſhould, there would be multiplicity of actions againſt one perſon for the ſame offence, all the caſes cited on the other ſide to that purpoſe are, where there was another remedy to puniſh the offender, either by information, preſentment, or indictment (*a*); but in the principal caſe the plaintiff had no other remedy but by this action, for there was neither a breach of the peace, or any public nuſance.

THIRDLY, As to the objection made to the form of this declaration, that the plaintiff did not ſet forth that he had a right to enter the room where the veſtry was kept, that is anſwered by ſhewing, that there was a general ſummons for the pariſhioners * to meet on ſuch a day, and in ſuch a room near the church; and admitting it to be the defendant's room, yet if he let it for that day, it is then the room of the pariſhioners for that day; and this the Court will preſume in this caſe. * [354]

FOURTHLY, As to the objection, that if the pariſhioners had any particular right to a ſelect veſtry, that matter ought to be ſet forth by the defendant in pleading, which he had not done, but demurred (*b*); and the plaintiff had ſet forth a ſufficient right at common-law to entitle him to this action; for he declares, that every pariſhioner who paid ſcot and lot had a right to be preſent and vote, &c. and that he was a pariſhioner, &c, and paid ſcot and lot; and the pariſhioners are a body politic for that purpoſe, and for many other purpoſes; pariſhioners may make rates for repairing their church, and may diſtrain for ſuch rates (*c*).

FIFTHLY, That ſince bye-laws bind the property of every inhabitant, it is reaſonable every inhabitant ſhould have a right to diſſent from or to approve them. They have power of electing their own officers amenable only to themſelves (*d*). They are a corporation to make bye-laws for mending the highways, and for making banks to keep out the ſea, and for repairing the church and making a bridge, &c. or any ſuch thing which is for the public good; all which was reſolved in *The Chamberlain of London's Caſe* (*e*). And by the ſtatute 3. & 4. *Will.* 3. c. 11. and 7. *Ann.* c. 17. ſ. 4. they are made a body politick to ſeveral other purpoſes, as to tax and levy the rate for maintaining the poor, and to tax the pariſh to make and maintain engines for extinguiſhing fires; and by the ſtatute 9. *Geo.* c. 7. ſ. 4. they are made a body politick for purchaſing work-houſes to employ the poor, and conſequently

(*a*) See the caſe of Aſhby *v.* White, 2. Ld. Ray. 949. 6. Mod. 50. 8. St. Tr. 89. 3. Salk. 18.

(*b*) It was inſiſted that the right of the plaintiff was confeſſed by the demurrer; but it was anſwered, that nothing is confeſſed by a demurrer but what is well alledged, and that the declaration was bad in this caſe for want of proper allegations.—NOTE *to the former edition.*

(*c*) Year Book 44. *Edw.* 3. pl. 19. 1. Mod. 194.

(*d*) Gibſon's Codex, 241. 5. Mod. 325.

(*e*) 5. Co. 66. See alſo, S. P. 1. Mod. 194.

PHILLIBROWN *againſt* RYLAND.

every pariſhioner hath a right to be preſent at their publick meetings in a veſtry.

RAYMOND, *Chief Juſtice.* The plaintiff does not ſhew any right to THE VESTRY to which he claims admittance; ſo that if he had no right to come in, the ſhutting the door againſt him could be no injury to him. But I am of opinion, that this action had been maintainable if a right had been ſhewn. There is a difference between an act which is a common nuſance, and an act which diſturbs the particular right of any perſons; for the latter will intitle the perſons injured to their ſeveral actions, though there may be a hundred or more perſons injured.

FORTESCUE, *Juſtice.* In the caſe of *Rex v. Soley* (*a*) the defendant was indicted for taking off the door of the guild-hall of a corporation; which indictment after a verdict was held ill, becauſe no title being ſhewn to the guild-hall, it might be the freehold of the defendant.

REYNOLDS, *Juſtice.* The declaration is ill for the objection that was taken. But without difficulty I ſhould hold the action maintainable if the declaration had been good. Every pariſhioner has a right to aſſemble, and if illegally obſtructed, he has no remedy but by an action on the caſe. No information can lie unleſs there be a riot or breach of the peace. The caſe of *Payne v. Partridge* (*b*) is a caſe in point.

Judgment was given for the defendant.

(*a*)

(*b*) 1. Salk. 12. pl. 1. S. C. 3. Mod. 289. S. C. Ld. Ray. 493.

* [355]

Caſe 288.

* Kent *againſt* Kerry.

An action of dower of three *tenements* is not good, for the incertainty of the word "tenement."

S. C. 2. Ld. Ray. 1384. 6. C. 2. Stra. 625. Cro. Jac. 125. 621. 5. Com. Dig. "Pleader" (2. Y. 2.). 2. Stra. 834. Cowp. 346.

DOWER in the common pleas. The plaintiff declared for her dower in three meſſuages, and three tenements, &c. The tenant confeſſed the action; upon which judgment was given to recover her dower and damages.

A writ of error was brought in this court, and the errors aſſigned were,

FIRST EXCEPTION. That the word "tenement" was of ſuch an uncertain ſignification in the law, that the ſheriff could not deliver poſſeſſion of it; that by the concurrent authorities in the books, an ejectment will not lie of "a tenement" for the reaſon before mentioned (*a*), neither can *a fine* be levied of it (*b*).

SECOND EXCEPTION. The plaintiff did not ſet forth, that her huſband died ſeiſed, for which reaſon no damages can be recovered

(*a*) But ſee Mr. Nolan's edit. of Strange, 834. and the caſe of Maſſey *v.* Rice, Cowp. 346.

(*b*) Year Book 3. *Edw.* 4. pl. 14. 1. Sid. 295. March, 96. Noy, 86. 3. Leon. 28. Cro. Jac. 125. 621. Cro. Car. 188. 3. Mod. 238.

by

by the ſtatute; and yet the ſheriff has executed a writ of inquiry of damages, and by virtue of the writ *habere facias ſeiſinam* has delivered to the plaintiff ſeiſin of ſuch a houſe, &c. or ſo much thereof as is worth ten pounds a year, which is void for the incertainty.

KENT *againſt* KEMP.

THE COUNSEL *for the plaintiff* argued, that in dower there was not ſo much certainty required as in a *præcipe quòd reddat*, or other real action, for a writ of dower lies of "a garden," "a croft," or "a cottage (*a*);" but if it did not lie of "a tenement," yet the tenant coming in, and confeſſing the action, has made it good; for a plea often aids defects and uncertainty in a declaration. * It is certainly ſo, where the defendant has pleaded collateral pleas to a declaration where the demand was not ſufficiently ſet out; this is proved by the caſes of *Slack v. Bowſal* (*b*) and *Buckland v. Otley* (*c*), and by a late caſe between *Gibley v. Williams* (*d*). Debt by an adminiſtratrix upon a bond; *non eſt factum* pleaded; and found for the plaintiff; an objection was taken to the declaration for not ſhewing the letters of adminiſtration, nor by whom granted, nor ſo much as ſtiling herſelf adminiſtratrix of the debts, goods and chattels of the deceaſed; but it was over-ruled, the plaintiff's title being admitted by the plea.

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AS TO THE SECOND OBJECTION concerning damages, it is very true, that the plaintiff ought to have ſet forth, that her huſband died ſeiſed, &c. and it is a fatal error to omit it; but it is an error for which the judgment for damages ſhall only be reverſed; for in dower the judgment is complete before the damages are recovered; it is like a *quare impedit*, where the firſt judgment is good by the common law without damages (*e*).

THE COURT. Here is a demand made of a ſpecific thing which is to be recovered and aſſigned by the ſheriff. The confeſſion cannot aid the uncertainty. The caſes quoted are different; for there money only is to be recovered. "Tenement" is uncertain: The declaration cannot be maintained.

Judgment was reverſed.

(*a*) Year Book 8. *Hen.* 6. pl. 3. abridged by Brooke, "Dower" 92.
(*b*) Cro. Jac. 668.
(*c*) Cro. Jac. 683.
(*d*) Hilary Term, 12. *Will.* 3.
(*e*) Specot's Caſe, 5. Co. 57.

Burland *againſt* Tyler.

Caſe 289.

AN ADMINISTRATOR brought an action of debt in the *debet et detinet* againſt the heir of the obligor, and concluded his declaration, *ad damnum ipſius* the plaintiff, &c.

If a plaintiff as adminiſtrator bring an action in the *debet et detinet* againſt the heir; it is

On demurrer to the plea, which was admitted to be ill,

a fault in form only, and no advantage ſhall be taken of it, but upon a ſpecial demurrer.—S. C. 2. Ld. Ray. 1393.

TOP,

BURLAND *againſt* TYLER.

Mo. 566.
Cro. Eliz. 711.
Cro. Jac. 546.
Lane, 79.
Stile, 232.
5. Rep. 31. a. b.
Lev. 124.
Sid. 342.
5. Com. Dig. "Pleader" (2. E. 1.).
1. Bac. Abr. 303.

TOP, *for the defendant*, inſiſted that the declaration was naught, to which he took two exceptions:

FIRST, That the action was brought againſt the heir in the *debet et detinet*, when it ſhould be in the *detinet* only.

SECONDLY, That the declaration concluded, "*ad damnum ipſius* the plaintiff," when it ſhould be *in retardationem adminiſtrationis*.

CHAPPLE, *Serjeant*. The firſt exception would have been cured, if after a verdict, by ſtatute 16. & 17. *Car.* 2. c. 8. and if ſo, it will be cured by ſtatute 4. *Ann.* c. 16. being after a general demurrer.

THE COURT. The 16. & 17. *Car.* 2. c. 8. called *The Oxford Act*, cures the defect, if a verdict has paſſed; and by ſtatute 4. *Ann.* c. 16. judgment is to be given without reſpect to any defect in the declaration, unleſs ſhewn for cauſe of demurrer, ſo as the right of the cauſe appears.

AS TO THE SECOND EXCEPTION, this is only matter of form. Beſides, the modern precedents are according to this declaration.

And judgment was given for the plaintiff.

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Caſe 290.

* The King *againſt* Weſtbury.

Indictment for a *reſcous* muſt ſet forth the *fieri facias* at large; ſetting forth *quòd cum virtute brevis, &c. de fieri facias*, and a warrant thereon, he levied the goods, &c. and that the defendant reſcued them, is not ſufficient.

Co. Lit. 303.
5. Co. 121.
4. Com. Dig. "Indictment" (G. 3.).

THIS was an indictment againſt the defendant, for that *T. S.* and other bailiffs, &c. did, *virtute brevis domini regis de fieri facias*, and a warrant thereon, levy the goods of *M. G.* and that the ſaid defendant *Weſtbury* with others did aſſemble, and *riotosè et rautosè* did reſcue the ſaid goods, and aſſault and beat the bailiffs, and ſo diſturbed them *in executione brevis et warranti prædict.*

Upon not guilty pleaded, it was found againſt the defendant.

It was now moved in arreſt of judgment,

FIRST, That the *fieri facias* was not well ſet forth; for it was "*virtute brevis domini regis de fieri facias*," without ſetting forth the writ itſelf, and without mentioning the party's name.

SECONDLY, It ſets forth, that there was a warrant *ſecundum exigentiam brevis prædicti*, and that the defendant diſturbed the bailiffs *in executione brevis et warranti prædicti*, which is ill; for if there was no writ, there could be no warrant: it is true, this indictment mentions a writ, but it is not well ſet forth, and if ſo, the warrant muſt fail; for the Court can never judge whether it is *ſecundum exigentiam brevis*, when no good writ appears to be made.

E contra. This writ is ſet out by way of circumſtance only, *quòd cum virtute brevis, &c.* but if there was none, yet the warrant would juſtify the bailiffs, or maintain this indictment for the wrong done.

THE

THE COURT. It is very true, the bailiff may defend himſelf by the warrant, but a writ muſt be ſhewn to charge a ſtranger; and this is the conſtant difference in ſuch caſes; and as this caſe is, an indictment would have laid for a ſingle battery, but the warrant itſelf, and the diſturbing another in the execution of that warrant, both refer to the writ; and that being not well ſet forth, thoſe things which refer to it muſt neceſſarily fail. THE KING *againſt* WESTBURY.

For which reaſon the judgment was ſet aſide.

* The King *againſt* Grey.

Caſe 291.

AN INDICTMENT was found at a quarter-ſeſſions held in *Cheſter* before the juſtices of peace for the county of *Eſſex*, for a nuſance done there by the defendant, by laying pigs of lead in the high-road.

Where by a ſurrender of a charter the corporation is not diſſolved.

The indictment being removed by the defendant into the court of king's bench by *certiorari*, the defendant pleaded, and ſet forth the charter of *King Charles the Second* by which this borough was incorporated, and cognizance granted to them to determine all pleas and affairs ariſing within that town; with a clauſe that no juſtices of peace for the county at large ſhall enter into the ſaid borough, *nec deinde in aliquo ſe intromittant, nec eorum aliquis ſe intromittat quovis modo*, &c. and that this indictment was void, being found there before the juſtices of the county, who had no juriſdiction in the ſaid borough.

THE KING'S CORONER replied, and ſet forth a ſurrender of the ſaid charter granted by *Charles the Second* to this corporation, &c. and of all and every the liberties and franchiſes therein contained.

The defendant rejoined, and ſet forth the letters patent of *King William and Mary*, by which all the lands, privileges and franchiſes of this corporation were granted, reſtored, and confirmed to them in as large a manner as at any time they enjoyed before the ſurrender.

And upon a demurrer to this rejoinder, theſe points were made.

FIRST, Whether the king can by his charter grant to certain perſons, in a certain place, a power excluſive of himſelf, ſo that at no time afterwards he can adminiſter juſtice in the ſame place: and if it ſhould be admitted that the king might grant ſuch an excluſive power or juriſdiction, then, Whether he has granted it by theſe words in the charter, "that the juſtices of the county ſhall not "enter the borough, *nec ſe inde in aliquo intromittant*, &c."

See 2. Stra. 1154.

MR. REEVE *for the king*, admitting that ſuch an excluſive juriſdiction is granted by this charter, argued, that the manner of demanding cognizance is not legal. It was adjudged in the caſe of *Manners v. Fern* (*a*), that the defendant may plead cognizance

(*a*) Fort. 153. 10. Mod. 125, 156. 5. Vin. Abr. 589. pl. 22.

THE KING *againſt* GRAY.

as well as the lord may demand it; but it was then held, that he muſt come the very firſt inſtance and make the claim. In this caſe the defendant ought to have pleaded the cognizance at the quarter-ſeſſions, and not to remove the indictment and then plead it above; he has by ſo doing elapſed the time allowed by law.

THE CHIEF QUESTION was, Whether by the ſurrender of the charter made in the thirty-ſixth year of *Charles the Second* the corporation was wholly diſſolved; for if it was, then the charter of *King William*, by which the lands and privileges were regranted, is void, becauſe it was to a corporation not in being.

*[359] * As to THE FIRST POINT it was argued, that this charter granted in the fifteenth year of *Charles the Second* did not give excluſive conuſance to this corporation, but that there remained a concurrent juriſdiction in the juſtices of the county; for the words are, that the juſtices of the county ſhall not enter the borough, *nec ſe inde in aliquo intromittant*, that is, they ſhall not enter to exerciſe any juriſdiction: but this does not exclude them from entering to take preſentments and indictments for any miſdemeanors committed there. It is like the grant of a franchiſe to return writs, but notwithſtanding ſuch grant the ſheriff is not excluded. So at the beſt theſe are doubtful words, and therefore ſhall never be intended to enlarge the juriſdiction of this corporation, ſo as to exclude the juſtices of the county.

THE SECOND POINT (*a*) was not much inſiſted on, becauſe if the indictment was void, as taken *coram non judice*, then there could be no occaſion of pleading this excluſive conuſance below and immediately: but ſuppoſing there ſhould, a *certiorari* doth not make the merits of the plea worſe, for the defendant hath done no act to admit the juriſdiction of the juſtices. Therefore this is not like a *claim of conuſance, &c.* becauſe in ſuch caſe, the act done is only to be avoided by pleading ſuch claim, and that in due time, for otherwiſe juſtice might be delayed by an untimely claim.

As to THE THIRD AND CHIEF POINT, it is admitted by the pleadings, that the charter granted by *King Charles the Second*, in the fifteenth year of his reign, was ſurrendered; and it was inſiſted, that by ſuch ſurrender the corporation was abſolutely diſſolved, and if ſo, then the charter of *King William* and *Queen Mary* is wholly void, becauſe it is not a grant of creation, but of confirmation and reſtoring the liberties of a corporation which was not then in being, and ſo could not take by ſuch grant; and it ſhall never be taken for a charter of creation and confirmation too, for that would be to a double intent, which the law doth not allow in ſuch caſes. Beſides, here are no words of creation, and therefore it is like that caſe in THE YEAR BOOK 9. *Edw.* 4. c. 11. where the king granted an office to *T. S.* but it was held, if this was not an

Roll. Abr. 513. (F.) pl. 1. Co. Rep. 52. a. Co. Lit 264. a. 29. *Edw.* 4. c. 6. pl. 11. 2. Co. Rep. 56.

(*a*) This is wrong placed, it ſhould have come in fol. 360. as ſaid in behalf of the defendant, for ſo it was in fact, being part of *Serjeant Comyns'* argument, who argued for the defendant.—NOTE *to the former edition.*

office

office before the grant, it was not good, becauſe there were no words of creating this office. So if the king grants ſuch a thing *inhabitantibus de Dale*, this is void, unleſs they were a corporation before the grant, for the reaſon before mentioned.

THE KING *againſt* GREY.

IT WAS ARGUED *to quaſh this indictment* as taken *coram non judice*, that by the charter granted in the fifteenth year of *Charles the Second*, an excluſive juriſdiction * was granted to this corporation, and that the juſtices of peace of the county had none there, for the corporation-men have the authority of juſtices within their corporation; and the juſtices of the county are not to enter, or *in aliquo ſe inde intromittere*. And ſo is the *Abbot of St. Alban's Caſe (a)*, where the king granted a power to him to make juſtices of peace within the borough of *St. Albans*, *ita quod* the juſtices of the county of *Hertford* ſhould not intermeddle, in the ſame words as in the preſent grant; it was adjudged in that caſe, that the juſtices of the county were excluded; and that if they acted in the ſaid borough, it was *coram non judice*, and by conſequence void; and all excluſive juriſdictions in letters patents are always in this form of words, and no inſtance can be given to the contrary. The grant of the return of writs was a particular franchiſe, and not parallel to this caſe, becauſe it did not appear upon the record that the ſheriff was excluded, or that he had no juriſdiction within that liberty, and it could amount to no more than to exclude the ſheriff in perſon. It is true, the ſheriff, notwithſtanding ſuch grant, may make a return; but if he doth, it is an injury done to him who had a grant of that franchiſe, for which he may maintain an action againſt him.

* [360]

AS TO THE CHIEF POINT, that by the ſurrender of this charter, the corporate body was wholly diſſolved, and therefore their liberties could not be reſtored by the charter of *King William*, becauſe there was no corporate body in being to take; it was argued, that the corporation was not entirely diſſolved: it is true, by this ſurrender all their lands and liberties were given up, but ſtill they had a corporate capacity to take, &c. But admitting that their corporate body was entirely diſſolved, yet by the grant of *King William* it appears, that he intended to reinſtate them in the ſame privileges which they had loſt, for he gave them the ſame liberties by way of grant and reſtitution; the charter of revivor has uſed the ſame words as are uſed in the charter of ſurrender; and certainly they will have the ſame effect to reveſt as they had to deveſt; therefore this is not like that caſe where the king made a grant *inhabitantibus de Dale*, for there he was deceived in his grant, there being no corporation before; and certainly where a corporation is re-inſtated by a charter, the king intended to give them a capacity to take; and where his intent appears, and no ſet form of words are requiſite for that purpoſe in the grant, there his intention ſhall prevail.

4 Com. Dig. "Franchiſes" (G. 2).

(*a*) Year Book 20. *Hen.* 7. pl. 6, 7, and 8. Brook. Abr. "Patent" 111. Crompton's Juriſdiction of Courts, 8.

THE

THE KING *againſt* GREY.

* THE COURT ſeemed of different opinions in this caſe:

THE CHIEF JUSTICE being of opinion upon the firſt point, that the king might grant to others ſo as to exclude himſelf from adminiſtring juſtice in the ſame place afterwards; for he is the fountain of juriſdiction as well as of juſtice, and may diſtribute it as he thinks convenient; and for this there is an authority in the Year Book 20. *Hen.* 7.

20. *Hen.* 7. c. 6. See Hardres, 505. *Quere* this.

TWO OTHER JUDGES laid no great ſtreſs on that caſe, for it appears by *Dugdale's Originei Juridiciales*, that there were but two Judges then in court, who held that the king might grant by a charter excluſive to himſelf: it is true, there can be no inconvenience of failure of juſtice, if the king had ſuch a power; becauſe, if it is miſuſed or abuſed, it is forfeited.

Dalton, 23. Lamb. 47.

And therefore THREE OF THEM HELD, that the king might exclude himſelf by his charter; which FORTESCUE denied, for that he had ſtill a concurrent juriſdiction which he had granted by commiſſion to the juſtices of the county; therefore it is not void as to *Colcheſter*, and good for the reſt of the county, but voidable only as to *Colcheſter*; and if ſo, there can be no inconvenience in it, becauſe then the corporation may claim their right, and ſo may the party grieved.

Quere this.

Dalton, 10.

AS TO THE CHIEF POINT, Whether the very being of the corporation was deſtroyed by this ſurrender?

THREE OF THE JUDGES held that it was not, and compared it to the ſurrender of a deed, that the eſtate was not thereby ſurrendered, therefore the corporation was ſtill ſubſiſting, and had a capacity to take, and by the charter of *King William* did retake; and it would be very inconvenient if it ſhould be otherwiſe, (that is) if they could give up more by a ſurrender than they can take by a regrant. In the great caſe of the city of *London* ſeveral learned men were of opinion, that a ſurrender did not deſtroy the being of a corporation; this appears by the ſurrender of abbies in the reign of *Henry the Eighth*, for it was not thought proper at that time to reſt purely on thoſe ſurrenders, but to have them confirmed by act of parliament. There is a particular proviſo in the ſtatute 27. *Hen.* 8. c. 24. ſ. 6. that corporations ſhall have the power of making juſtices of peace as they had before, which power is mentioned in the ſtatute 22. *Hen.* 8. c. 5. which act is confirmed by the ſtatute 3. & 4. *Phil. & Mary*, c. . ; and though the king is impowered by act of parliament to make juſtices of peace in the counties, it cannot be inferred from thence, but that he may limit and abridge this power to certain precincts in the counties.

Quere this.

*[362] * FORTESCUE, *Juſtice*, held, that though barely by the ſurrender of this charter the corporation was not diſſolved, yet there were other words in it, by which they gave up all the liberties and privileges which they then enjoyed, by which words the very being of this corporation was diſſolved; and if ſo, then the next queſtion will

will be, whether it was reſtored by the re-grant of *King William*. For there is no occaſion of any ſet form of words in letters patent of incorporation, for the firſt and original grants of them was to have *gildam mercatoriam*, therefore by the charter of *King William*, by which all the lands and liberties were granted, reſtored and confirmed to this corporation, they were actually reſtored, and intended by the king ſo to be.

THE KING *againſt* GREY.

But this being a caſe of great weight, it was adjourned farther to be argued.

Morice *againſt* Lee. Caſe 292.

AN ACTION was brought againſt *the drawer* by the *ſecond indorſee*, upon A NOTE given in theſe words: "I PROMISE to "account with *T. S.* or his order, for fifty pounds value received "by me, &c."

A PROMISSORY NOTE in theſe words, "I PROMISE to account with *T. S.* or his order, for fifty pounds, value received, &c." is a negotiable note within the ſtatute 3. & 4. *Ann.* c. 9.

S. C. 1. Stra. 619. S. C. 2. Ld. Ray. 1396. 2. Stra. 706. 1151. Ld. Ray. 1545. 1. Burr. 323. 5. Com. Dig. "Merchant" (F. 16.).

After a verdict for the plaintiff,

IT WAS MOVED *in arreſt of judgment*, that this was not a good note within the ſtatute 3. & 4. *Ann.* c. 9. It is plain it is not within the words of the ſtatute, for thoſe are, "all notes ſigned "after the firſt of *Auguſt* 1705, by any perſon promiſing thereby "to pay to another, &c. or order, or bearer, &c. ſhall be aſſignable, "and the drawee or indorſee to whom the money is payable, may "maintain his action for the ſame againſt the drawer or indorſor." Now this note is not negotiable, becauſe the promiſe is not to pay money, but to account, and in all promiſſory notes the drawer muſt be an abſolute debtor, otherwiſe they cannot be negotiated; but in this note he is not a debtor originally, though he may be ſo when the account is ſtated; ſo this may be between merchant and factor; and therefore if the drawer had applied this money as factor to *T. S.* he might have avoided the payment of the money by that means. In the caſe of *Smith v. Boheme* (*a*), in the firſt year of *George the Firſt*, it was reſolved, that where one promiſed to *T. S.* to pay ſeventy pounds, or to ſurrender the principal; this was not a note aſſignable within the ſtatute, for it was not negotiable *ab origine*, and ſhall never be made good by conſequence.

* IT WAS SAID *on the other ſide*, that this was a good note within the ſtatute; and if ſo, the action is well brought by *the indorſee*. It is true, it is not within the very words of the act of parliament; but the ſtatute ought to be favourably conſtrued, becauſe it was made for the advancement of juſtice, and for the eaſe and benefit of traders. It is like the conſtruction which has been made on the ſtatute of waſte, where the words are, "*ex dimiſſione*;" but it has been reſolved, that eſtates *ex proviſione legis*, *viz.* eſtates by the curteſy, or in dower, are within the equity thereof. Beſides,

* [363]

(*a*) 3. Ld. Raym. 63.

the

MORICE *againſt* LEE.

the note itſelf has the badge of A PROMISSORY NOTE, for it is to be accountable to *T. S.* or his order; which word "accountable" is not ſo very uncertain (*a*), for it is laid in the declaration upon an expreſs promiſe; and therefore good after verdict, eſpecially ſince the ſtatute doth not preſcribe any ſet form of words in which theſe promiſſory notes are to be drawn. The caſe of *Smith v. Boheme* (*b*), and ſo likewiſe the caſe of *Appleby v. Biddolph* (*c*), where the note was in theſe words, "I PROMISE to pay to *T. M.* "ſo much money, if my brother doth not pay it within ſuch a "time," in both which caſes judgment was arreſted after a verdict, are authorities not applicable to the principal caſe; becauſe *the drawer* was not the original debtor, but might be a debtor upon a contingency.

*[364] * RAYMOND, *Chief Juſtice.* The act of 3. & 4. *Ann.* c. 9. is a remedial law, and to be extended in conſtruction as far as in reaſon we can. The expreſſions uſed for theſe notes always vary. It is ſufficient if the ſubſtance of the note is a promiſe to pay money. An employment of this money in factory might have been given in evidence as an excuſe for the non-payment; the contrary of which is now to be ſuppoſed, ſince a verdict is found for the plaintiff.

FORTESCUE, *Juſtice.* The Court will conſtrue this note as a note for payment of money; for a note to account to me or order is abſurd. I have ſeen ſeveral promiſſory notes drawn in this form. A man that receives money to account for, does not receive the money as a duty, but as a truſt; therefore no *indebitatus aſſumpſit* lies, without ſhewing ſome miſapplication, or breach of truſt. Beſides, this note is "for value received." If there had been no verdict, I ſhould have thought this a good promiſſory note: but the verdict has put it beyond all diſpute, becauſe now a promiſe to pay is found. A promiſſory note in this form had been good, "I PROMISE that *J. S.* or order ſhall receive a hundred pounds." The caſe of *Smith v. Boheme* was no promiſe to pay at all, but to pay or ſurrender. No preciſe form is required for theſe notes, or for bills of exchange. A bill of exchange may be between two perſons, "I PROMISE to pay to myſelf or to my order." This is a debt, being "for value received," and not ſaid "on account;" whereas a receipt of money to account creates a truſt. How can a fourth or fifth indorſee account with the defendant?

REYNOLDS, *Juſtice.* This had been a good promiſſory note within the ſtatute, had there been no verdict. No form is preſcribed by the ſtatute. The objection that has been generally taken to promiſſory notes has been, that the money has been payable only out of or upon the credit of ſuch a particular fund, and not dependant on the credit of the drawee; as *Jocelin v. La Serre* (*d*),

(*a*) Salk. 9. 139.
(*b*) 3. Ld. Raym. 63.
(*c*) Bull. N. P. 272.
(*d*) Fort. 281. 10. Mod. 294.

a pro-

a promiſſory note to be reſponſible for a hundred pounds, would be a good promiſſory note within 3. & 4. *Ann.* c. 9. Morier *againſt* Lee.

THE COURT gave judgment for the plaintiff.

The King *againſt* The Biſhop of Cheſter. Caſe 293.

ERROR of a judgment in a *quare impedit* was brought in the county palatine of *Lancaſter*, againſt the *Biſhop of Cheſter*, for refuſing to admit one *Peploe* to the wardenſhip of *Mancheſter College* upon the preſentation of the king.

Faculty granted by the archbiſhop need not be ſubſcribed, regiſtered, or enrolled by the chief clerk of the faculty, but by his deputy.

S. C. Stra. 624. 3. Com. Dig. "Courts" (N. 5.). 1. Bac. Abr. 612.

The biſhop pleaded, that he claimed nothing but as ordinary, and ſet forth that this college was founded by *Charles the Second*, who appointed a warden thereof, and that all ſucceſſive wardens ſhould be bachelors of divinity, and that the ſaid *Peploe* was not a bachelor of divinity; therefore he (the biſhop) could not admit him to be warden.

Upon iſſue joined, whether he was a bachelor of divinity or not, the cauſe was tried, and evidence was given, that the *Archbiſhop of Canterbury* had granted a faculty or degree of bachelor of divinity to the ſaid *Peploe inſtanter*; that faculties were granted by the *Archbiſhops of Canterbury* for the time being, by cuſtom and uſage immemorial; and that this was confirmed to them by the ſtatute 25. *Hen.* 8. c. 21.

THE COUNSEL *for the defendant* tendered a *bill of exceptions* to this evidence, which was over-ruled below: and thereupon a verdict was found for the king.

The defendant now brought a writ of error, and aſſigned the errors following:

A *faculty* may be ſtamped, and thereby rendered valid, after it has been inrolled. Caſes Cro. Law, 221. Eſpin. Dig. 777.

FIRST EXCEPTION. It did not appear that this faculty was ſtamped, or that the duty was paid at the time it was enrolled in chancery, as it ought to be by virtue of the ſtatute 9. & 10. *Will.* 3. c. 28. therefore it not being ſtamped when enrolled, it is void.

This was anſwered by THE COUNSEL *on the other ſide*, and RESOLVED BY THE COURT, that the ſtamp-act 5. & 6. *Will.* 3. c. 21. was only to ſecure the duty to the crown, and not to take away any evidence from the parties: the clauſe therein is, "that "if any perſon ſhall write on parchment or paper charged with "the duties payable by that and former acts, he ſhall forfeit ten "pounds, and that it ſhall not be given in evidence till the duty "and penalty is paid;" and it is every day's practice, that upon payment of the duty and penalty, the writing is made good.

SECOND EXCEPTION. This faculty was not ſubſcribed and regiſtered by the archbiſhop's clerk of the faculties, as required by the ſaid ſtatute 25. *Hen.* 8. c. 21. 2. Stra. 797.

THE KING *againſt* BISHOP OF CHESTER.

As to this exception it was anſwered and reſolved, that this faculty was not ſubſcribed by the archbiſhop's clerk of the faculties but by his under-clerk, when it is expreſsly required by the ſtatute 25. *Hen.* 8. c. 21. that it ſhould be ſigned by the clerk himſelf, is very true; but the act is but directory, and it is not ſaid, that it ſhall be ſigned by the chief clerk himſelf; ſo that this being ſigned by his under-clerk, and it being cuſtomary in this office for the under-clerks to ſign faculties, this exception is of no weight.

THIRD EXCEPTION. That it was not ſubſcribed and enrolled by the king's clerk of the faculties in *chancery*, as it ought, becauſe he is empowered by the ſtatute to tender an oath to the perſon who has obtained it; which ſtatute was made to reſtrain the extravagant grants of THE POPE in thoſe days; and therefore ſhould be fully and ſtrictly performed by the clerks themſelves, and not by their deputy-clerks. And this muſt be intended by the legiſlators, for otherwiſe this act would have been penned as the ſtatute of
* [365] Wills (*a*), or as the ſtatute * of Promiſſory Notes (*b*), by which it is enacted, that the ſigning ſhall be by the parties themſelves, or by "any other perſon authorized by them." Therefore this muſt be done by the principal clerks themſelves, and not by their under-clerks, for it is not aſſignable to them: and therefore this faculty is void, eſpecially ſince there is a proviſo therein, that it ſhall not be good till ſubſcribed and regiſtered by the clerk of the faculties in chancery, which is in the nature of a condition precedent, and not to be ſigned or ſubſcribed by his order.

As to THE THIRD and chiefeſt exception, that there is a proviſo in the faculty itſelf, that it ſhall not be good, unleſs ſubſcribed and regiſtered by the clerk of the faculties in chancery, IT WAS HELD, that where a man does any thing by the expreſs order of another, as it was done in this caſe, it is as good as if done by himſelf; as where one expreſsly orders another to ſign a deed which the perſon thus ordered did afterwards ſign, this is good as one determinate act: but where a deputy doth any thing by virtue of general deputation, it muſt be where a deputy may be made by law.

The judgment was affirmed.

(*a*) 32. *Hen.* 8. c. 1. and 34. *Hen.* 8. c. 5. (*b*) 3. & 4. *Ann.* c. 9.

* [366]

Caſe 294.

* Steed *againſt* Lateward.

The ſame notice muſt be given of executing a *ſcire facias* as of executing a common writ of enquiry.

A JUDGMENT was obtained by default; the defendant died; and the plaintiff brought a *ſcire facias* againſt his executor to ſhew cauſe *quare inquiſitionem non habet, &c.* and afterwards the *writ of inquiry* was executed.

IT WAS MOVED to ſet aſide the execution thereof and to have reſtitution, for that the executor had no notice given of executing

9. C. 2. Ld. Ray. 1382. 8 C. 1. Stra. 623. Stra. 235. 2. Barnes, 237. Pract. Reg. C. P. 379. Rep. and Caſ. of Pract. C. P. 1. 5. Com. Dig. "Pleader" (Z. 2.).

this

this writ of inquiry until his goods were taken in execution. By a rule of court, notice is to be given on executing every writ of inquiry; and this is certainly a writ of inquiry: This point was adjudged in the caſe of *Cockley v. Delauney (a)*.

STEED *againſt* LATEWARD.

FAZAKERLY *contra*. The practice of the Court has been contrary ſince that reſolution; no notice is ever given on executing an *elegit*, where an inquiſition is likewiſe taken, becauſe it is only for the ſheriff's information.

THE COURT. We cannot vary from that reſolution. In ejectment, the conſtant courſe was to take out execution after the year, without any *ſcire facias*; but the Court thought proper to alter that courſe, by reſolving that a *ſcire facias* was neceſſary. Upon the *fieri facias* the ſheriff may return *a devaſtavit*; but by that return, if falſe, he ſubjected himſelf to an action, which by this method is prevented.

And afterwards, on THE MASTER's report, it was ſet aſide, there being no difference between this and other writs of inquiry (*b*).

(*a*) Michaelmas Term, 12. *Ann.* Philips, 1. Stra. 235. See alſo Stead *v.* Lateward, 2. Stra. 623. Gilb. Rep. 95. Pract. Reg. 379.

(*b*) Reſolved accordingly in Biron *v.*

The King *againſt* Tuck. Caſe 295.

THE DEFENDANT was convicted before a juſtice of peace upon the ſtatute 6. & 7. *Will.* 3. c. 11. made againſt profane curſing and ſwearing (*a*).

In an information on 19. *Geo.* 2. c. 21. if the defendant is charged with having forfeited *two ſhillings*, he ſhall be intended to be a *gentleman*.

Upon a motion to quaſh this conviction, the objections were as follow:

FIRST, By the ſtatute, the perſon convicted is to forfeit two ſhillings for every oath, if he is not a common labourer, ſoldier, or ſailor; now it does not appear upon the oath of the informer, that the defendant was a gentleman, and neither a common labourer, ſoldier or ſailor.

THE COURT held, that it is not neceſſary to aver, that the defendant is not a *ſoldier*, *ſailor*, or *common labourer*; for ſince he is charged with *two ſhillings* for every offence, it ſhall be intended that he is a *gentleman*, if ſo charged by the informer.

SECONDLY, It does not appear by this conviction of what age the defendant was, when he did profanely ſwear; for by the ſtatute he muſt be above ſixteen years old.

In a conviction for curſing and ſwearing, it ſhall be intended that the defendant was above ſixteen years of age.—S. C. 1. Seſſ. Caſes, 354. S. C. 2. Ld. Ray. 1386.

THE COURT held, that it ſhall be intended the defendant was *of age*, if ſo charged by the informer.

(*a*) This ſtatute is repealed by 19. *Geo.* 2. c. 21. ſ. 15.

THE KING *againſt* TUCK.

* THIRDLY, This conviction is uncertain, for after the nature of the oath is ſet out, the witneſs ſwears, that the defendant repeated it ſixteen times, for which he is convicted to forfeit thirty-two ſhillings, whereas a repetition preſuppoſes a former act done; ſo he ſwore ſeventeen times; therefore the conviction does not agree with the evidence.

THE COURT. As to the not charging him with more than ſixteen times, when it ſhould be ſeventeen times ſwearing, it is but giving one oath free, and there muſt not be too much nicety in theſe convictions: in the caſe between *The King v. Sparrow* (*a*), the conviction was quaſhed for not ſetting out the oath.

(*a*) Ante, 58.

Caſe 296.

The King *againſt* Dr. Shippen and Others.

In a prohibition the queſtion was, Who is viſitor of *University College* in *Oxford*?

IN A PROHIBITION, the caſe was, *Dr. Cockman* and *Dr. Denniſon* were candidates for the maſterſhip of UNIVERSITY COLLEGE in *Oxford*, and the firſt was declared maſter, but *Dr. Denniſon* and the diſſenting fellows of the college appealed to *Dr. Shippen*, the vice-chancellor, and others, as viſitors.

And thereupon it was ſuggeſted by *Dr. Cockman*, in a prohibition, that this college was founded by *King Alfred* in the year 872, as by ſeveral inſcriptions in the College it doth appear, and that the members thereof always commemorate that king in preaching, and all other public acts, and that the *Kings of England* were always viſitors of that college, and no other perſon had any viſitatorial power there.

This cauſe was referred to THE ATTORNEY and THE SOLICITOR GENERAL, and they were to report who was the founder of this college.

And they reported, that it was too difficult for them to determine after ſo long a time, who was the founder, and of greater difficulty to determine, whether the VICE-CHANCELLOR was viſitor.

Thereupon a rule was made, that the defendant ſhould ſhew cauſe why *a prohibition* ſhould not go.

Caſe 297.

* Martin *againſt* Budgell.

After the want of a bill filed in ſuch a Term, and certified by the Chief Juſtice, a bill ſhall not be filed of any other Term. S. C. ante, 283, 284, 285.

UPON a judgment by default, and a writ of error brought in parliament,

The error aſſigned was thus: *ſſ.* "MEMORANDUM *quod alias ſcilicet Termino Sancti Michaelis ultimo præterito coram domino rege apud Weſtm. venit T. S. &c. per* JOHANNEM STONE *attorn. ſuum et protulit hic in curia dicti domini regis tunc ibidem quandam billam ſuam, &c.*" when there was no ſuch bill of that Term.

And

And upon a *certiorari* from the houſe of peers to the Chief Juſtice of the king's bench, he certified that there was no ſuch bill. MARTIN *againſt* BUDGELL.

Whereupon the plaintiff ſuggeſted a bill of another Term, and moved the Court that it might be filed; and had leave to move the houſe of lords for another *certiorari* directed to the Chief Juſtice, that he might certify the bill of that Term ſuggeſted; and that houſe ordered, that the plaintiff ſhould have leave to ſue out another *certiorari*, and allowed his ſuggeſting a bill of another Term.

And now he moved the Court for leave to file a bill of the Term as ſuggeſted, as originals of another Term are allowed to be filed in the court of common pleas.

In the caſe of *Walmſley v. Corey (a)*, the MEMORANDUM was allowed to be amended by the bill. And this motion being made to ſupport a judgment given in the court of king's bench, which was affirmed upon a writ of error in the exchequer-chamber; and a writ of error now brought in parliament, after a bill in chancery brought for relief, and that bill diſmiſſed, the Court ought to do any thing in their power, after all theſe proceedings, to ſupport this judgment, eſpecially ſince the merits of the cauſe are entirely againſt the defendant; for otherwiſe he would have been relieved in ſome of thoſe courts; and as the declaration is but the copy of the bill, ſo the bill may be taken from the declaration. In the caſe of *Calvert v. Caſtilian (b)*, it was held and ſo allowed, that a bill might be filed after the want of it was aſſigned for error, which ſhews that a bill may be filed at any time.

THE COUNSEL *on the other ſide* ſaid, that the motion was improper after it was certified that there was no ſuch bill of that Term; and that the want of the bill is a good cauſe to be aſſigned for error, appears by the ſtatute made for the amendment of the law, by which it is enacted, "that judgments by default, *nil dicit*, "or upon demurrer, ſhall not be reverſed, if a bill * is duly filed;" which ſhews, that if it be not duly filed (as it was not in this caſe) ſuch judgments ſhall be reverſed. The court of common pleas will not admit the filing an original after the want of it is aſſigned for error; neither will this Court admit the filing a bill after the want of it is certified by the Chief Juſtice; if they ſhould, they ought to do it in all caſes, and conſequently the omiſſion of filing bills will be cured; and then it will be ludicrous to aſſign the want of them for error. It is true, this motion might have been proper before the Chief Juſtice had certified that there was no bill of that Term; for then the Court might indulge the plaintiff to file another bill; and that was the caſe of *Calvert v. Caſtilian*, but never after the Court hath certified, as in this caſe, that there was no bill of that Term, becauſe a bill of any other Term will not warrant this memorandum, which recites, that the bill was of ſuch

* [369]

2. Stra. 735. 10. Vin. Abr. 39. pl. 47.

(a) Ante, 284. (b)

MARTIN *againſt* BUDGELL.

a Term; therefore there being no bill of that Term, the judgment ought to be reverſed. It is admitted, that the judgments in the common pleas are ſupported by originals of former Terms, which is done and allowed by entering continuances; but it does not follow from thence, that the judgments in this court may be ſupported by filing bills of any other Term than what is ſet forth in THE MEMORANDUM; for in the common pleas THE MEMORANDUM is general, without alledging it to be of any certain Term; but THE MEMORANDUM in the court of king's bench is, that the bill was of a Term certain, and by conſequence cannot be warranted by a bill of any other Term.

[370] * RAYMOND, *Chief Juſtice.* I ſee no difference between giving leave to file this bill, and granting an amendment after a writ of error brought.

FORTESCUE, *Juſtice.* It is expreſsly reſolved 8. *Co.* 156. b. that what is amendable at common law is amendable at any time. This is the ſame as the caſe of *Winckworth v. Clarke* (*a*), where continuances were permitted to be entered to the *bill of Middleſex* after a writ of error brought. I have often heard it ſaid, that a *bill of Middleſex* may be filed at any time.

REYNOLDS, *Juſtice.* No writ of error will be ever brought, if after an aſſignment of it for error, it may be aided by filing a bill.

THE COURT. It cannot be filed but by motion in court. And upon conſidering the circumſtances of the caſe, as here appears to have been the moſt affected delay, the bill may be filed of a Term precedent with continuances, ſo as to agree with THE MEMORANDUM.

Cur. adviſare vult.

(*a*) 2. Stra. 735. 10. Vin. Abr. 39. pl. 47.

Caſe 298. ## The King *againſt* The Pariſh of St. Mary Matfellon, Whitechapel.

Settlement of a poor man ſhall be in the pariſh where he ſerves and hath wages, and not in the pariſh where he lives.

A POOR man was hired for five years to work for ten ſhillings a week at a glaſs-houſe, in the pariſh of *Whitechapel*, from ſix in the morning until eight at night, and to find himſelf with meat, drink, waſhing, and lodging; and he lodged every night for the whole time, except one month, in the pariſh of *Whitechapel*, only not in his maſter's houſe.

S. C. Foley, 146. S. C. 2. Seſſ. Caſes, 120. Ante, 309. Foley, 101.

This man was removed by an order of two juſtices from *Whitechapel* to *Ratcliffe*.

And upon an appeal to the ſeſſions the order was quaſhed.

THE

THE COURT was of opinion that he was ſettled at *Whitechapel* (*a*).

THE KING *againſt* THE PARISH OF ST MARY MATFELLON, WHITECHAPEL.

(*a*) Theſe orders were removed by *certiorari* into the king's bench. S. C. Foley, 146. The queſtion was, Whether the ſtatute 3. *Will. & Mary*, c. 11. extended to other than *menial ſervants*, S. C. 2 Bott, 457. HAWKINS, *Serjeant*, contended that it did not, and therefore as the pauper had never been any part of his maſter's family, he could not gain a ſettlement under this hiring and ſervice, S. C. 2. Seſſ. Caſes, 120. But THE COURT held, that the ſtatute only requires a hiring and ſervice for a year, and that it is not material whether the ſervant lives with the maſter or not, provided he lodges forty days in the pariſh, and therefore that he had gained a ſettlement in *Whitechapel*, S. C. 2. Seſſ. Caſes, 121. See Biſhop's Hatfield *v.* St. Peter's, Stra. 794. Rex *v.* Hemioak, Fort. 308. Goring *v.* Moleſworth, 1. Bar. K. B. 436. Rex *v.* Ladock, Burr. S C. 179. Rex *v.* Croſcombe, Burr. S. C. 256. and 2. Bott's P. L. 457 to 485. And if a ſervant ſerve forty days in the pariſh of *A.* and forty days in the pariſh of *B.* and then return to *A.* and lodge there the laſt day, he gains a ſettlement in the pariſh of *A.* Rex *v.* Undermilbeck, 5. Term Rep. 387. Rex *v.* Brighthelmſton, 5. Term Rep. 188.

William Maddox and Robert Godfrey *againſt* Taylor and Others.

Caſe 299.

TRESPASS for breaking and entering the houſe of *William Maddox*, and taking the goods of *William Maddox* and *Robert Godfrey*, *ad damnum ipſorum*; and a verdict for the plaintiffs, and entire damages.

Treſpaſs for entering *the houſe of A.* and taking *the goods* of *A.* and *B.* is bad, if entire damages be given.

S. C. 2. Ld. Ray. 1381.

IT WAS MOVED *in arreſt of judgment*, that this action could not be maintained, ſince the jury had given entire damages; for how can the plaintiff *William Maddox* (who had no right in the houſe, for that was in *Robert Godfrey*) recover damages for the unlawful entry?

So the judgment was arreſted.

TRINITY TERM,

The Eleventh of George the Firſt,

IN

The King's Bench.

1725.

Sir Robert Raymond, *Knt. Chief Juſtice.*

Sir Lyttleton Powys, *Knt.*
Sir John Forteſcue Aland, *Knt.* } *Juſtices.*
James Reynolds, *Eſq.*

Sir Philip Yorke, *Knt. Attorney General.*

Sir Clement Wearg, *Knt. Solicitor General.*

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* Philips *againſt* Fiſh. Caſe 300.

IN AN ACTION ON THE CASE for theſe words ſpoke of the plaintiff, *viz.* "Thou art a villain and thief;" *quorum quidem verborum propalatione* the plaintiff was not only much damnified in his fame and reputation, *verum etiam arreſtat. fuit* by procurement of the defendant, and carried before a juſtice of peace, and there impriſoned, &c.

If a declaration in ſlander for calling the plaintiff "*a thief,*" alſo ſtate, as a diſtinct and ſubſtantive injury, that he was, "by occaſion "thereof, and "through the "procurement "of the defendant, arreſted for ſelony, &c." *any* damages, however ſmall, will, upon a *general verdict*, entitle the plaintiff to *full coſts*.—Cro. Car. 163. 307. 1. Stra. 192. 645. 936. 2. Ld. Ray. 1589. 2. Kel. 71, 72. 2. Bar. K. B. 113. Bull. N. P. 11. Hullock on Coſts, 33. 2. Bl. Rep. 1062. 2. Burr. 1688. 3 Com. Dig. "Coſts" (A. 3.) Andr. 375. 1. Term Rep. 655. 1. H. Bl. Rep. 291. 5. Term Rep. 483.

Upon *not guilty* pleaded, the plaintiff had a verdict, and one ſhilling damages.

The queſtion was, Whether he ſhould have full coſts?

GAPPER, *for the defendant*, inſiſted, that the plaintiff ſhould have no more coſts than damages; for by the ſtatute 22. & 23. *Car.* 2. c. 9. it is enacted, "That in all actions of treſpaſs, aſſault, "and battery, and other perſonal actions, wherein a Judge ſhall

"not

PHILIPS *againſt* FISH.

" not certify upon the back of the record that a battery was " proved, or the title of the lands chiefly came in queſtion, if the " jury find under forty ſhillings damages the plaintiff ſhall have no " more coſts;" and this being an action on the caſe for words, is a perſonal action, and the jury having given but one ſhilling damages, the plaintiff ſhall have no more coſts.

LEE *for the plaintiff* argued, that in this caſe full coſts ought to be given, becauſe the action is not only for words, but the plaintiff expreſsly averred, that the defendant procured him to be arreſted for felony, which is a diſtinct fact laid, beſides the words, and not
* [372] by way of aggravation; but if it was, there is * no caſe to prove that full coſts ought not to be given.

THE COURT. If the fact that comes under the *verum etiam* is only laid in aggravation of damages, ſo that the words are the *gîst* of the action, then the plaintiff can have no more coſts than damages; but if it be laid as a diſtinct fact for which another action might be brought, then he ſhall recover full coſts *(a)*. Actions of *ſcandalum magnatum*, and for ſlandering a man's title, are actions for words, and yet not within the ſtatute of 21. *Jac.* c. 16. nor the ſtatute intended only to prevent frivolous actions for words. It is true, where a treſpaſs is laid with a *per quod, &c.*; as for inſtance, " *per quod ſervitium, &c.*" or " *per quod conſortium uxoris amiſit,*" there whatever comes under the *per quod* muſt be proved; otherwiſe the plaintiff cannot have a verdict, becauſe that is the *gîst* of the action; but in the principal caſe the action is founded on the words ſpoken, and the procuring the plaintiff to be arreſted for felony is laid in a different count, and the defendant is found guilty generally.

THE COURT therefore inclined, that the plaintiff ſhould have full coſts.

(*a*) Anderton *v.* Buckton, Hilary Term, 5. *Geo.* 1. in the king's bench.

* [373]

Caſe 301.

* Moorfoot *againſt* Chivers.

The *allowance* of a writ of error is a *ſuperſedeas* from the time of ſigning judgment, although it was not *ſerved*; for that is only to bring the party into contempt.

S. C. 1. Stra. 631. 1. Salk. 321. 3. Lev. 312. 2. Bl. Rep. 1183. 1. Term Rep. 279. 2. Term Rep. 44. 78. 5. Com. Dig. " Pleader" (3. B. 12.).

UPON A MOTION to ſet aſide an execution, the caſe was, that a writ of error was allowed about two of the clock in the afternoon, and about the ſame time the execution was ſerved.

IT WAS INSISTED, that from the time of the allowing the writ of error the hands of the Court are tied up; and if ſo, the execution is irregular, and ought to be ſet aſide.

All which was admitted on the other ſide, if notice had been given of the allowance of the writ of error before the ſerving the execution; otherwiſe it is regular; but here the plaintiff in the writ of error did not give the defendant any notice that it was allowed.

THE

THE COURT was of opinion, that if the plaintiff in error could ſhew that the writ was ſued out, and allowed before the execution was ſerved, it muſt be ſet aſide, though the defendant had not any notice of it *(a)*,

MOORFOOT *againſt* CHIVERS.

(*a*) It is ſaid, S. C. 1. Stra. 632. that the Court ſet the execution aſide, ſaying, that although the not being ſerved with the allowance of the writ of error was no contempt, yet in point of law it was a *ſuperſedeas* from the moment of pronouncing judgment.—And ſee Jaques *v.* Nixon, that the allowance of the writ of error is a *ſuperſedeas*, which operates only from the time of ſigning judgment, and that the ſervice of it is only to bring the party into contempt, if he proceeds, 1. Term Rep. 279.

Welſh *againſt* Craig.

Caſe 302.

IN AN ACTION OF DEBT ON A PROMISSORY NOTE, the defendant demurred to the declaration.

Debt will not lie upon A PROMISSORY NOTE, but an *indebitatus aſſumpſit*.

The queſtion was, Whether the action of debt would lie?

It was ſaid, that it would not lie againſt *the indorſor*, but that it would lie againſt *the drawer* (*a*). By the ſtatute 3. & 4. *Anne*, c. 9. it is enacted, "That all notes ſigned by any perſon, promiſing "to pay to another, or order, or bearer, the money mentioned in "ſuch note, ſhall be conſtrued to be due and payable to ſuch perſon "to whom it is made payable:" but though it is due and payable to the perſon, a general *indebitatus aſſumpſit* will not lie for it, for want of a conſideration; for a bill of exchange is only an evidence of a promiſe to pay, and is no more than *nudum pactum*; but a general *indebitatus aſſumpſit* will lie againſt *the drawer*, not upon the cuſtom of merchants, but for ſo much money received to the plaintiff's uſe, and the plaintiff may give the note in evidence.

S. C. 1. Stra. 680. Hard. 485. 1. Mod. 285. 1 Vent. 152. 1. Freem. 14. 1. Lev. 298. 1. Salk. 125. 12. Mod. 37. 345. Skin. 346. Kyd on Bills, 113. Bailey on Bills, 47 1. H. Bl. Rep. 320. 548. 5. Com. Dig. "Merchant" (F. 14.) (F. 15.),

THE COURT were clearly of opinion, that no action of *debt* would lie on A PROMISSORY NOTE, declaring thereon; but the plaintiff might have brought an *indebitatus aſſumpſit*, declaring generally, and ſo have given the note in evidence. By the cuſtom of merchants, no remedy was given on foreign bills of exchange but by action on the caſe. The ſtatute of 9. & 10. *Will.* 3. c. 17. has given the ſame remedy to inland bills, and the 3. & 4. *Anne*, c. 9. to promiſſory notes *(b)*. An *indebitatus aſſumpſit* will not lie on a bill of exchange.

THE COURT, however, gave the plaintiff leave to diſcontinue on payment of coſts.

(*a*) 1. Mod. Ent. 312. Morg. Prec. 548.

(*b*) The 3. & 4. *Anne*, c. 9. has put promiſſory notes upon the ſame footing as bills of exchange in all reſpects, Brown *v.* Haraden, 4. Term Rep. 148.—See alſo Carlos *v.* Fancourt, 5. Term Rep. 482.

Vaughan

Caſe 303. * Vaughan *againſt* Evans.

The grand ſeſſions in *Wales* cannot ſerve proceſs out of the juriſdiction of the court; and therefore they cannot *ſequeſter* the lands of a man who lives in *London* for non-appearance; for they cannot legally ſerve him with a *ſubpœna*.

S. C. 2. Ld. Ray. 1408. S. C. 1. Stra. 630. Roll. Abr. 540. Huit. 59. Ld. Ray. 698.

PROHIBITION to the court of grand ſeſſions in *Wales*. The caſe was thus: *Evans* had a mortgage of lands within the juriſdiction of that court, which lands were afterwards purchaſed by *Vaughan*, as he pretended, and he got into poſſeſſion by undue means. Then *Evans* the mortgagee filed a bill againſt him in that court, and againſt another who lived within the juriſdiction, but *Vaughan* lived in *London*, and was ſerved with a *ſubpœna* there; and not appearing upon the ſervice of the *ſubpœna*, the plaintiff *Evans* procured a ſequeſtration of this land, which lay within the juriſdiction of that court, and then, and not till then, *Vaughan* moved for a prohibition.

It was now argued, that *a prohibition* ought not to go, becauſe it was abſolutely neceſſary to make *Vaughan* a defendant jointly with the other who lived within the juriſdiction. Beſides, the COURT OF GRAND SESSIONS is a court of original juriſdiction, though circumſcribed as to place; and this being a perſonal proceſs, may be as well ſerved in *London* as the proceſs of the court of chancery may be ſerved in *Paris* or in *Dublin*, or elſewhere out of this realm, or the proceſs of the court of chancery may be ſerved here, which is done every day. It is true, that court cannot iſſue *an attachment*, or any other proceſs for a contempt out of their juriſdiction, which may be a reaſon for ſequeſtering the lands within their juriſdiction, until the party ſhall obey their proceſs. And this being the method of ſuperior courts, it is reaſonable the ſame method ſhould be purſued in this COURT OF GRAND SESSIONS; * and the caſe of *Tranter v. Diggan (a)* is no authority againſt it, becauſe it did not appear in that caſe that the plaintiff had any lands within the juriſdiction.

* [375]

THE COURT demanded of the Counſel, why the plaintiff did not diſmiſs his bill in the COURT OF GRAND SESSIONS, and exhibit a new bill in the court of chancery here.

TO WHICH *it was anſwered*, it would be very hard on the defendant in this *prohibition* ſo to do; for if he ſhould bring a new bill here, they would plead the proceedings below in *abatement* of that ſuit. Beſides, if the plaintiff below ſhould diſmiſs that bill, he muſt not only bear the expence of all thoſe proceedings, but muſt likewiſe pay coſts to the defendant for the ſuppoſed wrongful proceeding there.

THE COURT. The court of grand ſeſſions have no juriſdiction in this caſe; for *ſequeſtration* cannot iſſue but after a perſonal notice; and no perſonal notice can be given to the defendant who lives in *London*; becauſe their proceſs can only be ſerved in their own diſtrict, the remedy in this caſe would be in *chancery*, which

(a) Comb. 463. 12. Mod. 138. 172.

has

has juriſdiction over all *England*. But yet *chancery* hath no juriſdiction into *Wales* or *Ireland* (*a*). VAUGHAN *againſt* EVANS.

Let there be a prohibition.

(*a*) *Quære*, Then how to come at both theſe defendants, when each lives within a juriſdiction that excludes proceſs out of the other. SIR JOSEPH JEKYLL, *Maſter of the Rolls*, ſaid, in Frederick *v.* Frederick, heard 25 *March* 1732, that the proceſs of the court of chancery might be ſerved in *Wales*, on a petition.—NOTE *to former edition.*

Blackett *againſt* Finny. Caſe 304.

UPON A BILL exhibited to eſtabliſh a *modus*, the plaintiff ſet forth, that this *modus* was payable on or about the twenty-fifth day of *April*, &c. which is a void *modus*, becauſe it muſt be payable on a certain day, as was lately reſolved in the caſe of *Harriſon and Clarke*.

A *modus* payable on or about ſuch a day is not good; for the day muſt be certain.

S. C. Bunb. 176. 198.

Beſides, it is laid disjunctively in the bill, *viz.* that the pariſhioners of, &c. "conſtantly paid, *or* ought to pay, ſo much," when it ſhould be, "conſtantly paid, *and* ought to pay," &c. Then as to the *modus* for ſheep, it is laid, that the pariſhioners uſually paid fourpence for every ſcore, and ſo *pro rata*, but does not ſhew what they ſhould have paid for a leſs number, in caſe there were not ſo many as a ſcore.

The defendant put in his anſwer; and amongſt other things admitted, that the *modus*, as ſet forth in the bill, was payable on or about the twenty-fifth day of *April*, &c. but the plaintiff perceiving the faults in his bill, as before-mentioned, moved for leave to amend, and cited the caſe of *Reynolds v. Rogers*, where the plaintiff ſuggeſted a *modus*, but did not lay it payable on any certain day, neither did the defendant in his anſwer confeſs any day of payment; ſo that no certain day of payment appearing, either in the bill or anſwer, the defendant who was plaintiff in a croſs-bill having * laid it to be payable on a certain day, it was held good. * [376]

THE COURT. This is a caſe where an amendment of theſe things will not alter the nature of the proofs; and the day being admitted by the defendant in his anſwer, it is reaſonable that on payment of coſts the plaintiff ſhould amend, eſpecially ſince his right appears on the pleadings; therefore it would be too rigorous not to give him leave to amend, for in ſuch caſe the decree muſt be founded on his bill; and if his bill will not ſupport it, though a day is confeſſed in the defendant's anſwer, he can have no good decree.

Cowper

Caſe 305.

Cowper *againſt* Spencer.

In an action of aſſault and battery, if the defendant plead *ſon aſſault*, and the plaintiff reply *de injuriâ ſuâ propriâ*, and conclude to *the country*, and no iſſue taken thereon by entering a *ſimiliter* for the defendant, it is *informal*, and not amendable.

S. C. 1. Stra. 641.
1. Com. Dig. "Amendment" (O.).

AFTER A VERDICT for the plaintiff in an action of aſſault and battery, it was moved in arreſt of judgment, for that no iſſue was joined in the cauſe, it being, "*et hoc petit quòd inquiratur* "*per patriam*;" then theſe words ſhould follow, "*et prædictus*" (the defendant) "*ſimiliter*," which were omitted.

ON THE OTHER SIDE *it was ſaid*, that there is no occaſion for amending this iſſue, becauſe the appearance of the defendant is entered on THE POSTEA; beſides, at the worſt, it is only an informal iſſue, and that is amendable.

THE COURT. In indictments for treaſon there is no *ſimiliter* entered (*a*), and this Court muſt be guided by precedents, whether it is in this caſe amendable.

At another day the following caſes were cited, to ſhew that it was amendable. In *Fitzherbert* (*b*), an action was brought againſt ſeveral; they all pleaded, and in the replication one only joined in iſſue by a *ſimiliter*, and yet it was held amendable; and in *Dyer* (*c*), the entry was, "*et prædictus ſimiliter*," leaving out "the defend-"ant," and it was held amendable; and in the caſes cited in the margin (*d*), miſ-entries were adjudged to be amendable; and it was my *Lord Coke*'s opinion, that the miſpriſion of a clerk in a record may be amended; and in the caſe of *Davis v. Acherly* (*e*), in an action on three promiſſory notes, the defendant pleaded, as to two of them, that the drawee *non indorſavit*, and as to the third *non aſſumpſit* generally, *et prædictus* (the plaintiff) *ſimiliter*; and after verdict for the plaintiff, he was allowed to enter his judgment on the firſt iſſue; therefore if any amendment is neceſſary, it muſt be in this caſe, eſpecially ſince it is plain by THE POSTEA that the defendant appeared.

* [377]

* THE COURT. In every material iſſue joined, there muſt be a verdict on one ſide, otherwiſe there can be no judgment, and the plaintiff would now have judgment for damages on a verdict found on an *informal iſſue*, as he alledges it to be, but on *no iſſue* joined, as the defendant ſays: now there is a difference between *an immaterial* and *an informal* iſſue joined, and where there is *no iſſue* at all joined; and the caſes cited in the margin are, where the iſſues were informally joined; as where it is ſaid in the entry, "*et* "*prædictus defendens ſimiliter*," where it ſhould be, "*prædictus*" (the plaintiff) "*ſimiliter*;" in which caſe the iſſue is tendered by the defendant; but in the principal caſe the iſſue was tendered by the plaintiff, and never joined by the defendant; ſo there was no iſſue at all: which ſeemed to the Court not amendable (*f*).

(*a*) See Harris's Caſe, Cro. Jac. 502.
(*b*) Fitz. Abr. "Amendment," fo. 32.
(*c*) Dyer, 160, 161.
(*d*) 2. Roll. Rep. 200. Cro. Eliz. 752. Cro. Car. 435.
(*e*)
(*f*) The Court were all of opinion, that it was a fatal objection, and not amendable; and the judgment was arreſted, S. C. 1. Stra. 642 —But ſee the caſe of Sayer v. Pocock, where a replication was amended after verdict, by inſerting the *ſimiliter* inſtead of "&c." Cowp. 407.

Turner

Turner *againſt* Moſſe. Caſe 306.

WRIT OF ERROR on a judgment given in the common pleas in an action on the caſe.

A declaration *quod cum ipſi idem, &c.* inſtead of *ipſe idem, &c.* is good.

3. Bulſt. 82. Cro. Jac. 377. 1. Salk. 325. 5. Com. Dig. "Pleader" (C. 28.).

The error aſſigned was, for that there being but one defendant, the plaintiff had declared, *pro eo* VIDELICET *quod cum ipſi idem* the defendant, &c. inſtead of *ipſe idem, &c.*

But the judgment was affirmed, for the word "*ipſi*" is but ſurpluſage; and if it had been left out, the declaration would have been good without it.

The King *againſt* Venables. Caſe 307.

TWO JUSTICES made an order to ſuppreſs an alehouſe, upon the ſtatute of 5. & 6. *Edw.* 6. c. 24. which order was not obſerved.

In what caſe juſtices at ſeſſions may make a ſecond order to ſuppreſs an alehouſe.

The juſtices at the ſeſſions, therefore, made another order, in this form: "IT BEING made only to appear to us that *J. Venables* hath "acted contrary to the former order, IT IS HEREBY ORDERED, "that he be committed to the county-gaol, there to remain for "three days, and until he enters into a recognizance with two "ſureties no more to ſell ale, &c."

This laſt order being removed into this court,

REEVE moved to quaſh the ſame, becauſe it does not appear in the order, that the defendant was duly *ſummoned*, ſo had no opportunity to defend himſelf; for if he had been ſummoned, he might have ſhewed ſome cauſe againſt the making this order: as for inſtance; he might have a licence from other juſtices to ſell ale in the mean time. * A ſummons is neceſſary in all convictions. And though this is not an order of conviction, yet it is not merely to carry the former order into execution, becauſe ſome new fact muſt be proved as a ground for this puniſhment; and natural juſtice requires, that the defendant ſhould be ſummoned and heard before he is condemned. And ſo it was held in the caſe of *The Queen v. Dyer (a)*, which was a conviction on the ſtatute 1. *Jac.* 1. c. 7. for embezzling yarn, ſetting forth, that "WHEREAS "complaint had been made to *T. S.* and *E. G. &c.* and whereas "the defendant was duly ſummoned to appear before them, and by "virtue thereof did appear on *Tueſday* the ſeventeenth day of "*April*," whereas the ſeventeenth day of *April* was on a *Friday*; and for that reaſon the conviction was quaſhed; for it was held, that a ſummons was neceſſary, and that the time to appear upon ſuch ſummons was impoſſible, becauſe there was no ſuch day as *Tueſday* the ſeventeenth of *April*, therefore it was as if there had been no ſummons at all. And in the caſe of *The Queen v.*

* [378]

S. C. Sett. & Rem. 120. S. C. 2. Ld. Ray. 1405. S. C. 1. Seſſ. Caſes, 267. S. C. 1. Stra. 630. S. C. Fort. 329. Ante, 3. 101. 154. 4. Com. Dig. "Juſtices of "Peace" (B. 26.).

(a) Salk. 181.

Green,

THE KING against VENABLES.

Forteſc. Rep. 203. Gilb. Caſ. 130. Ante, 154.

Green (*a*), *Hil.* 12. *Anne*, a conviction for ſelling bread contrary to THE ASSISE was, that the defendant *debito modo ſummonitus fuit, et non apparuit*; and the Court held, that the ſummons itſelf ought to have been ſet out; for they would not intend a good ſummons.

FAZAKERLY, *againſt the defendant*, argued, that in convictions of this nature it is never neceſſary to ſet out, that the defendant was ſummoned. The caſe of *The Queen v. Dyer* is different; for if a bad ſummons be ſhewn, the Judge cannot intend a good one (*b*). In the caſe of *Rex v. Theed* (*c*), which was a conviction upon the Candle Act, which gives the officer power to enter in the day-time by himſelf, or in the night with a conſtable; and the conviction only ſaid that the officer *lawfully entered*, without ſpecifying whether in the day, or in the night; but this objection was overruled, becauſe the Court would intend the entry lawful. There is a difference between judicial and miniſterial acts; for in the one, all things ſhall be intended regular until the contrary appears: now, the ſuppreſſing an alehouſe is a judicial act; for by the ſtatute the juſtices of peace have a judicial power to ſuppreſs them *ad libitum*; and therefore the Court will intend that the defendant was duly ſummoned. But in miniſterial acts it is otherwiſe; for in ſuch caſes all muſt appear to be right, and nothing ſhall be ſo by intendment: as for inſtance; in the return of a *mandamus* all muſt appear to be regular, becauſe the returns are made by miniſterial officers.

RAYMOND, *Chief Juſtice*. The caſe of *Rex v. Clegg* was never determined; but the Court then ſaid, that the objection had never prevailed. There is a great difference between ſetting out a *bad ſummons* and *no ſummons* at all. In the firſt, there is no room to ſuppoſe a good ſummons; otherwiſe in the latter caſe; for if the juſtices make the conviction without a ſummons, they are liable to an information. Muſt we preſume the defendant was not ſummoned? There is no inſtance where an order was quaſhed for this exception. Whether an appeal lies or no makes no difference, becauſe the order muſt appear good on the face of it.

FORTESCUE, *Juſtice*. Since the juſtices had juriſdiction, we will not preſume that they acted againſt their duty; this objection never prevailed; it differs from a bad ſummons ſhewn.

Afterwards, on deliberation, the order was confirmed (*d*).

(*a*) Hilary Term, 12. *Anne*. 10. Mod. 272.

(*b*) Rex *v.* Clegg, ante, 3.

(*c*) Ante, 320.

(*d*) But it afterwards appearing to the Court, by affidavits, that the juſtices in ſeſſions had, in fact, made the order without ſummoning *Venables*, or affording him an opportunity of being heard, they gave leave to file AN INFORMATION againſt them for this miſconduct, S. C. 2. Ld. Ray. 1407.

The

* The Mariner's Caſe. Caſe 308.

LIBEL in the court of admiralty for *mariner's wages*. The plaintiff ſuggeſted for a prohibition a contract reduced into writing for the wages.

Mariners may ſue in the admiralty for wages, although they are due by written contract.

But the prohibition was denied, for the Court always indulges mariners to ſue in THE ADMIRALTY, becauſe, by the courſe of that court, many of them may join in the ſuit, and it is the cheapeſt and moſt expeditious method to recover their wages. If there is any ſpecial contract, as is now ſuggeſted, the defendant may plead it in that court; and if they do not allow that plea, then it may be a proper time to move the court of king's bench for a prohibition; for if it ſhould be granted before the plea is diſallowed, it is a prejudging the juſtice of that court.

1. Vent. 146. 3. Lev. 60. 2. Show. 86. 1. Salk. 33. Stra. 937. 707. 858. 1. Ld. Ray. 577. 2. Ld. Ray. 1247. 1206.

4. Burr. 1944. 2. Com. Dig. "Admiralty" (E. 15.).

Beach *againſt* Hobbs. Caſe 309.

IT was ruled by the Court, that to leave a declaration in the office before the *eſſoin-day* of the Term is a complete delivery thereof, if *notice* be given in writing to the attorney on the other ſide, and he refuſes to pay for the copy; but all attornies ought to deliver a copy of the declaration to the defendant's attornies, where they are known, and willing to pay for it; but if not known, or refuſing to pay for it, then it muſt be filed in the office before the *eſſoin-day* of the Term, and the attorney for the defendant muſt have notice of it before the *eſſoin-day*, otherwiſe he ſhall have an imparlance of courſe.

If a declaration be *filed*, it is a good *delivery* only from the time *notice* is given to the defendant or his attorney.

2. Ld. Ray. 1407. Tidd's Pract. 231.

3. Burr. 1452. 2. Term Rep. 113. 5. Com. Dig. "Pleader" (C.).

Anonymous. Caſe 310.

REPLEVIN. The defendant juſtified the taking the cattle *damage feaſant*; and it was now moved to ſtay proceedings, on bringing into court what was due with coſts.

In replevin, the money due on the bond may be paid into court.

THE COURT. If you bring in what is due upon the replevin-bond, proceedings ſhall be ſtayed, but if it is to ſtay proceedings on payment of what is due for damages, it ſhall not be granted, becauſe the Court has no rule to guide them in ſuch caſe; but it is otherwiſe for rent, for that is certain (*a*).

Ante, 305. 345. 5. Com. Dig. "Pleader" (C. 10.).

(*a*) See Hallet v. Eaſt India Company, 2. Burr. 1320. Bonafous v. Ryhot, 3. Burr. 1370.

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* Cambridge *againſt* Lea. Caſe 311.

ERROR ON A JUDGMENT in an action brought on a policy of inſurance.

Falſe Latin cured by a verdict.

CAMBRIDGE *against* LEA.

The error assigned was, for that after the plaintiff had set forth that the ship was laden with goods, and bound from such a place to such a place, and insured, that *navis prædicta et bona prædicta submersa fuit:* whereas the goods only, and not the ship, were insured.

THE COURT. This being only an insurance on *the goods*, nothing could be given in evidence at the trial but the loss thereof, without which evidence the plaintiff could never have a verdict; and as to the word "*fuit*," it is only false *Latin*, and cured by the verdict.

Moor, 888. Vent. 114.

So the judgment was affirmed.

Case 312.

The King *against* Harwood.

"*Non fuit electus*" is no good return to a *mandamus* to swear a churchwarden.

See ante, 325, *contra.*

A MANDAMUS was directed to the defendant, *Dr. Harwood*, as official to the archdeacon of *L.* to swear *T. S.* churchwarden of the parish of *H.* who returned, that *T. S. non fuit electus.*

Issue was taken thereon, and a verdict for the king.

S. C. 2. Ld. Ray. 1405.

CHAPPEL, *Serjeant*, moved in arrest of judgment, Because the return of *non electus* is a bad return, the archdeacon being no judge of the election. *The King v. Simpson* (*a*), *Rex v. Archdeacon of Cardigan* (*b*), *The Queen v. Guy* (*c*).

THE COURT. The return is a void return; the writ of *mandamus* commands the defendant to swear the churchwarden, or to return cause why he cannot swear him. Now he may return some causes as an incapacity; for that he is judge of; but he cannot deny the election; for that he is no judge of. The archdeacon is only a ministerial officer, and therefore bound to swear him. The swearing is only matter of form; because a churchwarden may act before he is sworn. The office of a churchwarden is a temporal office (*d*).

And THE COURT made a rule for a *peremptory mandamus*, *nisi*, &c. (*e*).

(*a*) Ante, 325.
(*b*) 8. *Will.* 3.
(*c*) 6. Mod. 89.
(*d*) Rex v. White, 1. Ld. Ray. 1379.
(*e*) This rule was made against the inclination of RAYMOND, *Chief Justice*, and REYNOLDS, *Justice*, and was afterwards discharged; and the Court not being unanimous, the case was put into the paper to be argued again, but it was never stirred again. LORD RAYMOND, however, adds, "there can be no doubt but "such a return is good," S. C. 2. Ld. Ray. 1405; and it is said in the argument of the case of Rex v. Ward, that it was determined to be a good return, Strange, 895.—And see Rex v. Simpson, ante, 325. Rex v. Lyme Regis, Dougl. 80 to 86.

TRINITY TERM,

The Twelfth of George the Firſt,

IN

The King's Bench.

1726.

Sir Robert Raymond, *Knt. Chief Juſtice.*

Sir Lyttleton Powis, *Knt.*
Sir John Forteſcue Aland, *Knt.* } *Juſtices.*
James Reynolds, *Eſq.*

Sir Philip Yorke, *Knt. Attorney General.*
Sir Clement Wearg, *Knt. Solicitor General.*

Cowper *againſt* Ginger.

Caſe 313.

RAYMOND, *Chief Juſtice*, delivered the opinion of the Court, that the writ of error *coram vobis* well lay; for that the record was removed by the firſt writ of error. The caſe of *Walter v. Stokoe*, in *Hilary Term*, 1693, is a caſe in point; and there no queſtion was made, but that the record was removed by the firſt writ of error. Ante, 316.

MICHAELMAS TERM,

The Twelfth of George the First,

IN

The King's Bench.

Sir Robert Raymond, *Knt. Chief Juſtice.*

Sir Lyttleton Powys, *Knt.*
Sir John Forteſcue Aland, *Knt.* } *Juſtices.*
James Reynolds, *Eſq.*

Sir Philip Yorke, *Knt. Attorney General.*
Sir Clement Wearg, *Knt. Solicitor General.*

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* Phillips *againſt* Fiſh.

Caſe 314.

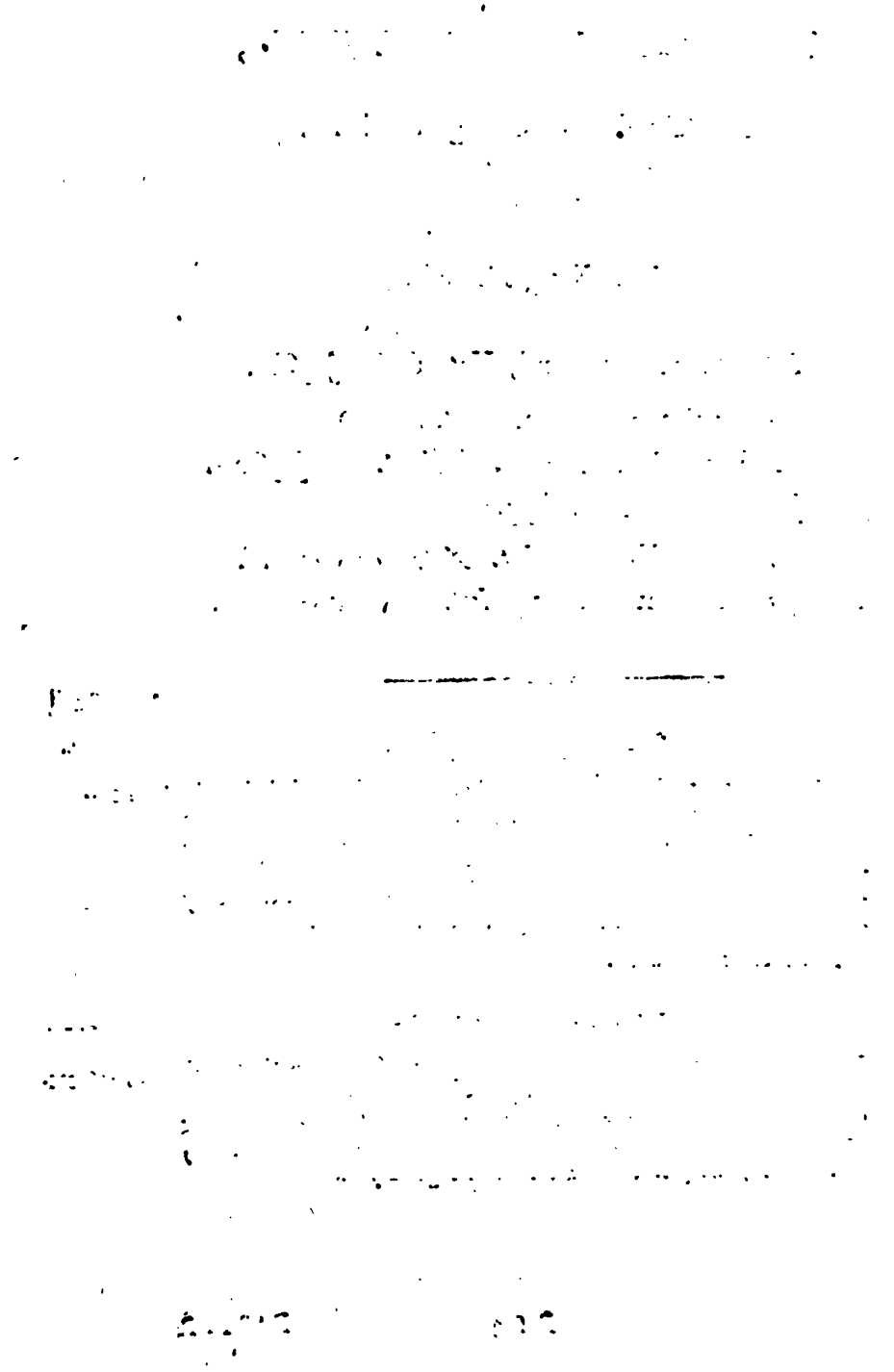
NOW THE COURT, after deliberation, delivered their opinion, that the plaintiff was intitled to full coſts; for as this declaration is worded, the arreſt and impriſonment are charged as diſtinct acts, for which the plaintiff might have brought a diſtinct action, and conſequently they cannot be eſteemed only acts laid for aggravation of damages. *Cro. Car.* 163. Ante, 371.

Let there be full coſts.

Warren *againſt* Conſet.

Caſe 315.

IN *Eaſter Term*, in the thirteenth year of *George the Firſt*, the judgment of the common pleas was affirmed in the court of king's bench by the whole Court; for that the action being founded on the articles, and the particular facts being but auxiliary to the deed, the plea of *nil debet* was no good plea. Ante, 106. 323.



EASTER TERM,

The First of George the Second,

IN

The King's Bench.

Sir Robert Raymond, *Knt. Chief Juſtice.*
Sir John Forteſcue Aland, *Knt.*
James Reynolds, *Eſq.*
Edmund Probyn, *Eſq.* } *Juſtices.*
Sir Philip Yorke, *Knt. Attorney General.*
Sir Clement Wearg, *Knt. Solicitor General.*

Shaw *againſt* Weigh.

Caſe 316.

The reſolution of the Court on a caſe by deviſe. Ante, 253. Forteſc. Rep. 70. 2. Stra. 832. Fitzgib. 17.

RAYMOND, *Chief Juſtice.* This caſe ſtands for the opinion of the Court. The term made to the plaintiff in ejectment is expired; and though we cannot reſtore the party to his poſſeſſion, yet we may give judgment. The judgment upon this ſpecial verdict below was, *quòd querens nil capiat per breve*; and we are all of opinion, that this judgment ought to be reverſed.

THE FIRST POINT before the Court is, What eſtate the truſtees have by the will, as no words of inheritance are made uſe of in the limitation to them.

AND WE ARE ALL OF OPINION, that the truſtees took an eſtate of inheritance by implication; for the intention of the teſtator was, that they ſhould take ſuch an eſtate as would ſupport the ſeveral truſts in the will; and they being eſtates of inheritance, the truſtees muſt have an eſtate of inheritance to ſupport ſuch truſts, as 1. *Roll. Abr.* 611. But this being given up on the firſt argument, we need not labour it.

THE SECOND POINT is, What eſtate the teſtator's ſiſters, *Dorothy* and *Anne*, took by the will? If they took an eſtate-tail, *Dorothy* might levy a fine, and ſuffer a recovery to bar the leſſor of

Shaw against Wrigh.

the plaintiff, and conſequently the judgment below would be good; but if the ſiſters took only an eſtate for life, the fine and recovery were a forfeiture of the eſtate, and no bar to the leſſor of the plaintiff.

And WE ARE ALL OF OPINION, that the ſiſters took only an eſtate for life, with remainders in tail to their iſſues. For firſt, after the death of his wife, the teſtator gives it "in truſt for *Anne* "and *Dorothy*, equally betwixt them, during their natural lives." Here if it had reſted, it would be an expreſs eſtate for life to them: and then he declares his intention by ſaying, "they ſhall commit no "manner of waſte." Now can it be ſaid, that he intended them an eſtate of inheritance, when he obliges them not to commit any waſte? But to proceed: He provides, that "if the five hundred *[383] "pounds, or any part, be paid by his ſaid * ſiſters, that then they "may raiſe ſuch money by digging of coals only;" ſo that he reſtrains their power to digging of coals only. The power his wife had was to ſell, or cut and ſell timber, or dig coals, &c.; but no ſuch power is given to the iſſues, becauſe it is plain he intended the ſiſters ſhould take an eſtate for life, and the iſſues an eſtate in tail; ſo there was no occaſion to give them a power which they had by virtue of the eſtate given to them.

Then the will goes on, "and if either of my ſaid ſiſters die, "leaving iſſue or iſſues, &c. then in truſt for ſuch iſſue or iſſues of "the mother's ſhare, or elſe in truſt for the ſurvivor or ſurvivors of "them." The queſtion upon this is, Whether "iſſue or iſſues" are words of limitation, or a *deſignatio perſonæ*. At common law, "iſſue" is not a word of limitation in deeds, *Coke Second Inſtitute*, 334. and in caſe of an uſe, the ſame law; for if a feoffment is made to the uſe of *J. S.* and his iſſue male, this does not paſs an eſtate-tail: but in wills "*iſſue*" is ſometimes a word of limitation, and ſometimes a word of purchaſe, according as the teſtator's intention appears in the will.

Ante, 256. The caſe of *Loddington v. Kime*, in 3. *Lev.* 431. is not well reported. I heard it argued *ſeriatim*, and the caſe was adjudged, that *Ivers Armin* took only an eſtate for life; and that point remained unſhaken in chancery and the houſe of lords; ſo that "iſſue" there was judged a good word of purchaſe, though an eſtate for life was given to the father of the iſſue.

Ante, 261. The caſe of *Blackhurt v. Wells*, *Hil.* 12. *Annæ*, is a ſtrong caſe: There the deviſe was to *A.* for life only, and after his death to his iſſue, and the heirs of ſuch iſſue; and that was adjudged an eſtate for life in *A.* and the "iſſue" was a word of purchaſe, though *A.* took an eſtate for life; and what the Court moſtly relied on in that caſe was, the intention of the teſtator appearing from the words only, and the limitation over to the heirs of the iſſues.

Now here the intention appears as plainly, that the ſiſters were to take an eſtate for life only, as I have partly ſhewn; then the words

words "ſurvivor or ſurvivors" ſhew the iſſue were to take by purchaſe, for "ſurvivors" cannot relate to ſiſters, there being but two. And the will goes further, "and their reſpective iſſue or iſſues;" ſo that the iſſue of the ſiſters were to take an eſtate which was to deſcend to their iſſues; and when an eſtate for life is given to one, and after to his iſſue, with a limitation over to his iſſue of ſuch iſſue, the firſt takes only an eſtate for life, and the iſſue take as purchaſors. The caſe of *Clerk v. Day*, reported in *Cro. Eliz.* 313. 1. *Roll's Abr.* 832. and *Moor*, 593. is to that purpoſe; yet I doubt none of theſe books have ſtated it as it is on the roll; yet *Moor* is the laſt, and ſays it was adjudged, and he is a judicious reporter; the other two were young at that time; but as in *Moor*, the teſtator deviſed "to his daughter * for life, and if ſhe marry * [384] "after my death, and have iſſue of her body, &c. then I will, that "her heir after my daughter's death ſhall have the land, and to "the heirs of their bodies begotten:" and it was adjudged, that the daughter took only an eſtate for life, and her heirs an eſtate of inheritance by purchaſe.

SHAW *againſt* WEIGH.

The caſe of *King v. Melling*, reported in 2. *Lev.* and 1. *Vent.* has been ſtrongly relied on for the defendant. That caſe, I agree, is eſtabliſhed, but there is no occaſion to carry it one jot further; and we are of opinion it does not come up to this caſe; there is not a limitation over, as in this caſe, "to the iſſues of the iſſue;" and if *Hale*'s opinion be truly reported in that caſe, he is clearly of opinion, if there had been a limitation over "to the iſſues of the "iſſue," the deviſee had taken only an eſtate for life, and the word "iſſue" had been a word of purchaſe.

Another objection is, that if the ſiſters do not take an eſtate-tail by the words already mentioned, yet they are tenants in tail by the ſubſequent words, *viz.* "and if my ſiſters die without iſſue, "and their iſſue or iſſues die without iſſue, then, &c." Theſe words, they ſay, give them an eſtate-tail by implication, as in the caſes of *Sutton v. Pamon*, and *Langley v. Baldwin*, the laſt of which was in 1707. I anſwer, in thoſe caſes it is limited only to the firſt, ſecond, third, and fourth; ſo that all the iſſues that may be are not comprehended in the words of purchaſe; and therefore the words "if he die without iſſue" may, by implication, operate ſo as to give the father an eſtate-tail, for the fifth ſon could not take as a purchaſor, becauſe it is only to the firſt, ſecond, third, and fourth ſon; and then the words, "if he die without iſſue, then the "remainder over:" ſo that as long as he has iſſue the remainder cannot take effect; but here the words are general, and take in all the iſſues.

The caſe of *Popham v. Bamfield*, in *Salk.* 236. is ill reported; for the Book ſays, it was a deviſe to *A.* for life, remainder to his firſt, and ſo to his tenth ſon; but the material words "and to all "and every other ſon" are left out; but in *Dyer*, 171. it is ſaid, that an implication ſhall never ride over an expreſs limitation; and therefore if an eſtate is deviſed to *A.* for life, and after to his firſt

Ante, 260.

Shaw against Wright.

firſt ſon; and the heirs of the body of ſuch firſt ſon, and if *A.* die without iſſue, then over, in that caſe *A.* ſhall not have an eſtate by implication, becauſe there is an expreſs limitation in tail to his firſt ſon.

Another objection is, that this cannot be a *deſcriptio perſonæ* as comprehending male and female. I anſwer, it is a good word of purchaſe, by the plain intention of the teſtator. There was another point as to the croſs-remainders, but that is now out of the caſe, and we are of opinion the ſiſters were only tenants for life.

So the judgment was reverſed *per totam Curiam.*

2. Stra. 805.

Afterwards this cauſe went up into the houſe of lords, on a writ of error brought by *William Sparrow* and others, and was (*a*) argued by Mr. Attorney (*b*) General and Mr. Bootle to make it an eſtate-tail, and by Mr. Fazakerly and Mr. Strange to make it but an eſtate for life; and all the Judges being ordered to attend took time to conſider of it; and

Fitzgib. 30. 2. Stra. 805. Eq. Caſ. Abr. 185.

On 28th *April* 1729, nine were of opinion, that it was but an eſtate for life, *viz.* Raymond, Price, Page, Reynolds, Hale, Carter, Denton, Probyn, and Comyns; and the *Lord Chief Juſtice* Eyre, the *Lord Chief Baron* Pengelly, and *Mr. Juſtice* (*c*) Forteſcue, held it an eſtate-tail.

Forteſc. Rep. 90.

Before the lords gave judgment, the learned *Biſhop of Chicheſter, Doctor Hare,* ſtood up, and ſaid, he did not pretend to underſtand the niceties of the law, but this queſtion ſeemed to him very much to depend upon a grammatical conſtruction of the words of the will, and perceived that the three Judges who differed from the reſt ſeemed to argue from the grammar of it; and he was of opinion, that according to grammatical conſtruction he ſhould rather think "ſurvivor or ſurvivors" ſhould be moſt properly referred to the ſiſters rather than to the iſſue; and thereupon the houſe of lords, *nemine* (*d*) *contradicente*, gave judgment according to the opinion of the ſaid three Judges, and reverſed the judgment given by the king's bench.

(*a*) See the arguments in Fitzgib. 28.

(*b*) Sir Philip Yorke.

(*c*) See his argument in Forteſc. Rep. 82.

(*d*) Many lords who were of opinion to affirm being gone away, the judgment of B. R. was late at night reverſed, upon a diviſion of ten lords againſt ſeven, 2. Stra. 805.

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4. In treſpaſs *quare clauſum fregit*, and all local actions, the plaintiff cannot prove a treſpaſs anywhere but where it is laid in the declaration. nor lay it anywhere but where done, *Walrond v. Van Moſes*, 322
5. Treſpaſs for entering the houſe of *A.* and taking the goods of *B. ad damnum ipſorum*; after a verdict and entire damages, the judgment was arreſted, *Maddox v. Taylor*, 370
6. Treſpaſs on the caſe for deſtroying the plaintiff's common in ſix acres; a juſtification in three acres only is ill, *Moſſe v. Bennett*, 120, 121
7. Treſpaſs againſt two, for taking cattle and converting them: one ſuffers judgment by default, the other juſtifies by diſtreſs for rent due to him who ſuffered judgment; and to the converſion pleaded the plaintiff's licence to ſell; which is found for him: the plaintiff now cannot have any benefit of the judgment, for it does not appear he had any cauſe of action, *Biggs v. Greenfield*, 218

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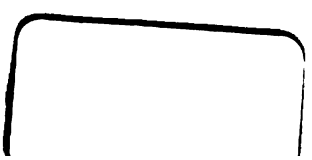
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